SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1974

HAYDEN THOMPSON; HERBERT MESCHKE; LARRY ERICKSON; RICHARD BACKES; GARY WILLIAMSON and MARK PURDY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Eighth Circuit Court of Appeals

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To the Eighth Circuit Court of Appeals

The petitioners, Hayden Thompson; Herbert Meschke; Larry Erickson; Richard Backes; Gary Williamson; and Mark Purdy, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 25, 1974, and the order denying the petition for rehearing entered in this proceeding on March 1, 1974.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals below, in **United States v. First Western State Bank of Minot,** its No. 73-1567, is reported at . . . F.2d . . ., and is appended at page A-1 hereof.

The opinion of the District Court of North Dakota below, in **United States v. First Western State Bank of Minot,** its Criminal No. 575, is not reported, and is appended at page A-15 hereof.

The opinions of the Eighth Circuit Court of Appeals in companion cases of **United States v. McDaniel,** 449 F.2d 832 (8th Cir. 1971), cert denied, 405 U.S. 992 (1972) and **United States v. McDaniel,** 482 F.2d 305 (8th Cir. 1973) are appended at page A-40 and page A-62 hereof.

JURISDICTION

The Circuit Court of Appeals' Opinion and Order was filed January 25, 1974, reversing the District Court's Memorandum and Order of July 16, 1973. Rehearing was denied by the Circuit Court of Appeals on March 1, 1974.

Jurisdiction in the Supreme Court is based upon 28 U.S.C. § 1254(1). Jurisdiction of the Court of Appeals was based on 18 U.S.C. § 3731.

QUESTIONS PRESENTED

1. Did federal prosecution carry burden of proof with *in camera* presentation of investigation reports and grand jury minutes, without opportunity to defendants to examine or cross-examine about course of use and extent of taint therein, in pre-trial use immunity hearing where federal prosecution followed related State testimony under immunity?

2. Did Court of Appeals err in reversing District Court's factual determination that federal prosecution failed to carry its burden of proof?

3. Did District Court or Court of Appeals more aptly apply protective standards of **Murphy v. Waterfront Commission** and **Kastigar?**

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V: United States Constitution

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI: United States Constitution.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18
§ 610 (relevant portion):

> "It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential or Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.
>
> "Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both."

United States Code, Title 18
§ 371:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

3 North Dakota Century Code, § 16-20-10:

> "No person shall be excused from attending and testifying or producing any books, papers, or other documents before any court upon any investigation, proceeding, or trial for violation of any of the provisions of section 16-20-08, upon the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate or degrade him. No person shall be prosecuted nor subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be used against him upon any criminal investigation or proceeding."

STATEMENT OF THE CASE

Hayden Thompson, Herbert Meschke, Larry Erickson and Richard Backes were directors and shareholders of First Western State Bank of Minot, North Dakota. Gary Williamson and Mark Purdy were shareholders of the Bank. Gary R. McDaniel was the Chief Executive Officer and President of the Bank, as well as a director and shareholder.

On May 19, 1969, McDaniel was discharged as President of the Bank when shortages and misappropriations came to light in the course of a state audit.

Both State and Federal grand juries investigated. A Federal Grand Jury convened September 23, 1969 and met at frequent intervals through July 31, 1970. A State Grand Jury convened October 14, 1969 and met almost continuously to December 8, 1969.

All six of these defendants, and McDaniel, were subpoenaed and testified before the State Grand Jury. Although both State and Federal prosecutors appeared to be unaware of the immunity statute, North Dakota law prevents any person from refusing to testify before a grand jury investigating violations of the State Corrupt Practices Act, but provides full immunity from prosecution for matters disclosed. 3 North Dakota Century Code §16-20-10.

On December 8, 1969, the State Grand Jury indicted McDaniel for 19 counts of false entries, embezzlement and violations of the State Corrupt Practices Act. The Bank was indicted for several violations of the State Corrupt Practices Act and was subsequently convicted in state court. These six individual defendants were indicted on one count of aiding and abetting political contributions by the Bank.

On February 4, 1970 (and July 31, 1970), Federal indictments were returned against McDaniel on twelve counts of embezzlement, misappropriation of funds, and making false entries in the records of a federally insured bank.

On March 9, 1970, the state trial judge quashed all of the state indictments against the individuals, these six defendants and McDaniel, upon the grounds that they were immune from prosecution because they had testified under subpoena and oath before the State Grand Jury.

On July 31, 1970, Federal indictments were returned against the bank on five counts of violating 18 U.S.C. §610, and against Thompson, Meschke, Erickson, Backes, Williamson, and Purdy on one count of conspiracy to cause the Bank to violate 18 U.S.C. §610. McDaniel was named as a co-conspirator but not charged in the indictment.

McDaniel was subsequently convicted on eleven counts of embezzlement, misappropriation and false entries, but, after appeal and remand, his convictions were vacated and his indictments dismissed. The dismissal was affirmed by the Court of Appeals finally, on July 31, 1973. McDaniel was discharged upon the grounds that the United States Attorney had "used" his State Grand Jury testimony given under immunity, when the U.S. Attorney on November 20, 1969, read a copy of the transcript of McDaniel's state grand jury testimony. **United States v. McDaniel,** 449 F.2d 832 (8th Cir. 1971), cert denied, 405 U.S. 992 (1972); **United States v. McDaniel,** 482 F.2d 305 (8th Cir. 1973).

These defendants moved to dismiss based upon the State immunity and the Federal prosecutor's use of the State Grand Jury testimony given under immunity. The motions were originally denied on February 3, 1971, by the late District Judge Register. The motions were renewed and supplemented on Au-

gust 13, 1971. After oral arguments before Ronald N. Davies, Senior United States District Judge presiding, the District Court on January 24, 1973 ordered a pretrial evidentiary hearing in order to allow the Government "an opportunity to meet the burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources" from the testimonies given by the defendants before the state grand jury.

Following the evidentiary hearing held on May 8-10, 1973, the District Court issued its Memorandum and Order on July 16, 1973, holding "that the Government wholly failed to meet" its burden, that "not all of the evidence the United States Government proposes to use was derived from legitimate, independent sources and that some of the evidence is a direct result of communications between Federal and State authorities, when both State and Federal Grand Juries were in session and immediately prior and subsequent thereto." The District Court concluded, "The herculean task of separating tainted evidence from that which is not could never be determined by this Court . . ." and held that the *in camera* presentation of F.B.I. reports and federal grand jury transcripts "falls far short of the duty imposed upon" the prosecution. The District Court issued a strong suppression order, suppressing "any evidence relating" to the testimony of these defendants before the State Grand Jury.

The Court of Appeals reversed the order of suppression and remanded for further exploration of the issue at trial, holding that introduction of F.B.I. reports and federal grand jury transcripts as possible independent sources sufficed to carry the Government's burden of proof for the pretrial evidentiary hearing.

The Court of Appeals barely noted, and did not discuss, the *in camera* presentation of the F.B.I. reports and federal grand jury transcripts, without opportunity to the defendants to exam-

ine them or cross-examine about them. The Court of Appeals did not have the F.B.I. transcripts and the federal grand jury transcripts in its record, noting they "were not filed on appeal." (Footnote 6, Court of Appeals Opinion, p. A-10 appended hereto). The Court of Appeals stated that "the District Court's order does not indicate that it has reviewed those reports . . ."

The failure of the Clerk of the District Court to transmit Exhibits Numbered 1 to 7 both inclusive, (Transcripts of Testimony before the Federal Grand Jury) and Exhibits Numbered 8 to 33 both inclusive, (The F.B.I. reports) did deprive the appellees of an effectual review based on the complete evidence in the case. There is no place in the record in this case which would indicate that the Senior United States District Judge did not review the evidence, including transcripts of Federal Grand Jury testimony and F.B.I. reports, which were offered and admitted into evidence over defendants' objections.

Since the report of the Circuit Court of Appeals clearly indicates that the Circuit Court did not review the F.B.I. reports and the Federal Grand Jury Transcripts, and since Senior District Judge Davies obviously did review those exhibits, it would appear that the Circuit Court was proceeding on an incorrect premise in determining this case.

REASONS FOR GRANTING THE WRIT

The Court of Appeals recognized:

> ". . . this case has profound implications in the enforcement of the criminal law . . ." (Court of Appeals Opinion, at p. A-2 appended).

With a federal prosecution following a state grant of immunity on the same subject, this case involves direct application of the protective use immunity standards forecast in this Court's decisions, **Murphy v. Waterfront Comm'n.,** 378 U.S. 52 (1964) and **Kastigar v. United States,** 406 U.S. 441 (1972) which dealt with use immunity at the granting stage. The issues here include application of the burden of proof on the prosecution to show lack of use or derivative use in a case where the District Court found access to and communication about the immunized testimony. And, specifically at issue is the sufficiency of *in camera* proof at the pretrial evidentiary hearing on "use", without opportunity to defendants to examine or cross-examine to trace the course of "use" and extent of taint.

1. **Did Federal Prosecution Carry Burden of Proof With In Camera Presentation of Investigation Reports and Grand Jury Minutes, Without Opportunity to Defendants to Examine or Cross-Examine About Course of Use and Extent of Taint Therein, in Pretrial Use Immunity Hearing Where Federal Prosecution Followed Related State Testimony Under Immunity?**

Thus far, the protective standards of "use immunity" have been articulated by the Supreme Court in the pre-testimony cases of **Murphy v. Waterfront Commission** and **Kastigar,** which arose from contempt orders for refusing to testify under a grant of immunity. Here, the District Court and the Court of Appeals were called on to apply these protective standards of

use immunity, for federal prosecutions following testimony under grant of state immunity. This case involves the realities of application of the protective standards only forecasted in **Murphy** and **Kastigar.**

Murphy expressly held that the Fifth Amendment privilege against self-incrimination protects a state witness, testifying under immunity, against federal prosecutions. In a footnote, the standard of that protection was described:

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence."

Kastigar followed **Murphy** and held use immunity constitutionally sufficient for single-sovereign situations as well, describing the standard of protection thus:

> "This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."

and:

> "One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources."

Here, in spite of the testimonial protestations of the federal and state prosecutorial staffs, the District Court found access and use. Specifically, the District Court found testimony about

lack of communication by the State's prosecuting attorney "incredible and unworthy of belief." The District Court went on:

> "The number of telephone calls this witness had with the United States Attorney's office, the Federal Bureau of Investigation and other investigatory or interested Federal agencies leads to the inescapable conclusion that information was conveyed to representatives of the United States Government that proscribe its use in a Federal criminal prosecution in the United States Court under the decision of the United States Supreme Court in **Murphy, Kastigar** and their progeny."

In this context, the District Court found the *in camera* evidentiary presentation of F.B.I. reports and federal grand jury transcripts insufficient. The District Court concluded:

> "This Court concludes that the Government wholly failed to meet this burden. The *in camera* material alluded to in the preceding paragraph sheds absolutely no light on whether the Government has met its judicially determined responsibilities."

Nearly all of the documentary material was submitted by the prosecution *in camera*: Exhibits 8 to 33, consisting of F.B.I. reports, and Exhibits 1 to 7, federal grand jury transcripts.

The *in camera* offer in bulk was objected to by the defendants at the hearing, upon the grounds that they were deprived of any opportunity to examine it or cross-examine about it. (Transcript pp. 347, 349 and 360)

This objection was carried forward on the appeal by this statement in Appellee's Responsive Brief, page 26 thereof:

> "The Government offered evidence on an 'in camera' basis so that the defendants were denied the opportunity to examine or cross-examine about it to follow up on the leads as to possible use. There is no denying that the right

> of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth-determining process. **Dutton v. Evans,** 400 U.S. 74, 89 (1970); **Bruton v. United States,** 391 U.S. 123, 135-137 (1968)."

Decisions based on secret evidence strain fundamental notions of liberty under any circumstances. When they involve fundamental constitutional rights of individuals, such as the Fifth Amendment, decisions based on secret *in camera* evidence surely test the credibility of our entire judicial system.

This Court has only recently held that a governmental interest in preserving confidentiality must yield to the defendants constitutional right to cross-examine; **Davis v. State of Alaska,** — U.S.—, 42 L.W. 4295 (Feb. 27, 1974), which held it was constitutional error to deny a defendant the right to cross-examine a juvenile witness where it conflicted with a State's asserted interest in preserving the confidentiality of juvenile adjudication of delinquency.

As this Court has observed, cross-examination "helps assure the accuracy of the truth-determining process", **Chambers v. State of Mississippi,** —U.S.—, 93 Sup. Crt. 1038 at 1046 (1973), adding:

> ". . . its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined."

We respectfully submit that the District Court's determination that the federal prosecution failed to carry its burden of proof with an *in camera* offer of proof should be reinstated, under both the Constitutional standards of the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to confrontation. The Court of Appeals' decision, which overlooked or ignored this issue in reviewing the District Court's Order, should be reviewed.

2. **Did the Court of Appeals Err in Reversing the District Court's Factual Determination That the Federal Prosecution Failed to Carry Its Burden of Proof?**

The Court of Appeals observed that the District Court's order "does not indicate that it had reviewed those reports . . ." and concluded:

> "The failure to review the Government's contended independent sources was error and a misinterpretation of the law . . ."

The Court of Appeals went on to conclude:

> "That testimony (of no access), the lack of contradictory evidence by the defendants showing actual knowledge or access to the state grand jury transcripts by federal authorities, and the introduction of the F.B.I. reports and the state and federal grand jury minutes should have discharged the Government's burden of proving independent sources during the pretrial hearing."

In so doing the Court of Appeals ignored the District Court's specific findings of access through numerous telephone calls, its specific finding "that information, was conveyed", and its specific finding that the testimony of one state prosecutor protesting no access was "incredible and unworthy of belief."

The Court of Appeals also criticizes the "lack of contradictory evidence by the defendants." Ironically, the Court of Appeals barely notes, and does not comment upon, the fact that the *in camera* tender of the documentary evidence effectively denied the defendants the opportunity to develop the contradictory evidence from its most likely source, the F.B.I. reports and federal grand jury transcripts. How could defendants trace the source of use and extent of taint, to present contradictory evidence, when they were denied any opportunity to examine the documentation of the investigation, or cross-examine about it?

The Court of Appeals assumed that the District Court failed to review the F.B.I. reports and federal grand jury transcripts, but the District Court did not say that it had not reviewed them. The District Court listed them in its Memorandum with the other evidence submitted and considered by the Court. The transcript of the evidentiary hearing indicates the District Court deferred his decision at the conclusion of the hearing in order to read and consider the *in camera* material (Transcript p. 408, lines 18-23: p. 421, lines 25 to p. 422, line 2; p. 423, lines 1-4). There is nothing in the record that indicates the District Court did not review the *in camera* material between concluding the hearing on May 10, 1973 and issuing its Memorandum and Order on July 16, 1973.

The Court of Appeals itself did not review the F.B.I. reports and federal grand jury transcripts, which it stresses as so greatly aiding the prosecution in discharging its burden of proof. In footnote 6, to its Opinion, it states they "were not filed on appeal." The Clerk of the District Court failed to file them on appeal with the Circuit Court.

Curiously, defendants find themselves in the position of having their legal position affirmed by the Court which considered the *in camera* exhibits, but reversed by the Court which did not even have those exhibits to consider but nevertheless stressed the great importance of them. Such a result is out of line with the usual standard of review, that Courts of review should accept factual determinations of a trial court unless "clearly erroneous."

We respectfully submit that review is appropriate to determine whether the Court of Appeals erred in reversing the factual determination of the District Court that the prosecution failed to carry its burden of proof as to use of immunized testimony. Review would also determine how "heavy" is that "heavy burden of proof" projected in **Kastigar.**

3. **Did the District Court or Court of Appeals More Aptly Apply the Protective Standards of Murphy and Kastigar?**

This case, and the Court of Appeals Opinion, pose several other aspects of applying **Murphy** and **Kastigar:**

First, the decision rendered by the panel seems to rely upon a different standard for the two-sovereign situation, than the single-sovereign situation:

> "But where the prosecuting sovereign is not the immunizing sovereign, a considerably different situation is presented." (Court of Appeals Opinion, p. A-4 appended).

No such differing standards were set forth in **Kastigar,** when the Supreme Court adopted the separate-sovereign use and derivative use immunity doctrine of **Murphy v. Waterfront Commissioners,** as the constitutional standard for the Federal single-sovereign situations. **Murphy** was followed in **Kastigar,** not distinguished. The Court of Appeals' decision appears to drift away from both **Murphy** and **Kastigar** in a manner inconsistent with the modern trend of even handed application of constitutional standards.

Next, the Court of Appeals suggests the issues of use and independent sources may be further explored at trial. However, F.B.I. investigation reports and Grand Jury transcripts are ordinarily not evidence at the criminal trial itself. It is highly doubtful the Government would call any F.B.I. agents to testify since their testimony is primarily hearsay. If the immunity evidentiary issues are to be developed in the course of trial, it will compound the complexities of a multiple defendant conspiracy trial with continual chamber sessions while the jury restlessly waits as each new evidentiary revelation is explored, out of its presence, for use of leads from immunized testimony. This will hardly facilitate an orderly trial process. Thus, trial exploration of tainted evidence issues, as suggested by the Court of Appeals,

is out of step with considerations of judicial economy, as well as current judicial thinking on the orderly process of a trial, **United States v. Dornau,** 356 F.Supp. 1091, at 1099 (1973), including the prior Eighth Circuit expressions on the desirability of pretrial resolution of the issue; **United States v. McDaniel (II),** 482 F.2d at 311:

> "Clearly, this test envisions, under ordinary circumstances, a pretrial evidentiary hearing at which the Government must discharge its 'heavy burden of proof . . .'
>
> * * *
>
> "Ordinarily, the question whether the prosecutor has made any use, direct or indirect, of the compelled testimony can and should be fully explored by an appropriate hearing before trial."

Neither **Murphy,** nor **Kastigar,** suggest a procedure of exploring the issue at trial. Indeed, everything said in those two cases suggests the need and desirability of fully resolving the issue in a pretrial evidentiary hearing.

Finally, this case presents questions as to the remedial steps to be taken when use or derivative use is found. Defendants' motions sought dismissal. Acting before the **McDaniel (II)** opinion was issued, the District Court fashioned a strong suppression order posing great difficulties for the prosecution. Emphasizing what it called the "immeasurable subjective effect" of derivative use, ". . . assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy . . .", the Eighth Circuit Court of Appeals discharged the defendant in a companion case, **United States v. McDaniel (II),** supra.

The Court of Appeals, in remanding this case for further exploration of the issue at trial, instructs only limited and selective suppression of "proffered evidence . . . (which) has only been derived from defendants' compelled testimonies."

Such a limited proscription appears inconsistent with **Kastigar,** where Mr. Justice Powell writing for the majority held:

> "This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigations on a witness as a result of his compelled disclosures."

Such a limited proscription also appears inconsistent with the Eighth Circuit Court of Appeals prior pronouncement in the related case:

> "Kastigar, after all, proscribed 'any use, direct or indirect . . .' And, indeed, if the immunity protection is to be coextensive with the Fifth Amendment privilege, as it must to be constitutionally sufficient, then it must forbid all prosecutorial use of the testimony not merely that which results in the presentation of evidence before the jury." 482 F.2d at —.

See also **United States v. Dornau,** 356 F.Supp. 1091 (S.D.N.Y. 1973).

Several circumstances of this case might well call for strong sanctions for any use or derivative use that occurred:

> 1) It took defendants over two and one-half years simply to get an evidentiary hearing on their claims of "use" of their immunized testimony. The federal prosecution resisted all initial efforts for such a hearing on varying grounds, including insistence that no state immunity had been granted and that there had been no communication about any defendants' testimony. An evidentiary hearing came only after defendants obtained and filed the public records of long distance telephone calls by the State prosecutor (showing communication with the federal prosecutors during critical periods), and after the belated admission by the

prosecuting U.S. Attorney in the Court of Appeals in **McDaniel (I)** that he had read a transcript of McDaniel's immunized state grand jury testimony.

2) The indictment deals with potential First Amendment rights of association in alleging a political conspiracy that includes specified overt acts of candidacy for various state legislative and political party offices by each of the defendants.

The sweeping reach of the indictment and the significant delay of trial resulting from the need for this "use" should be considerations in determining the remedy to be applied for any use.

Thus, we submit that review is also appropriate to consider these aspects of the application of the protective standards of **Murphy** and **Kastigar** involved in the decisions of the District Court and Court of Appeals in this case:

1) Whether there are different constitutional standards of use immunity protection;

2) Whether the Constitution protection should preferably be developed through pretrial hearings or during the course of trial; and

3) What remedy is to be applied for "use".

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted

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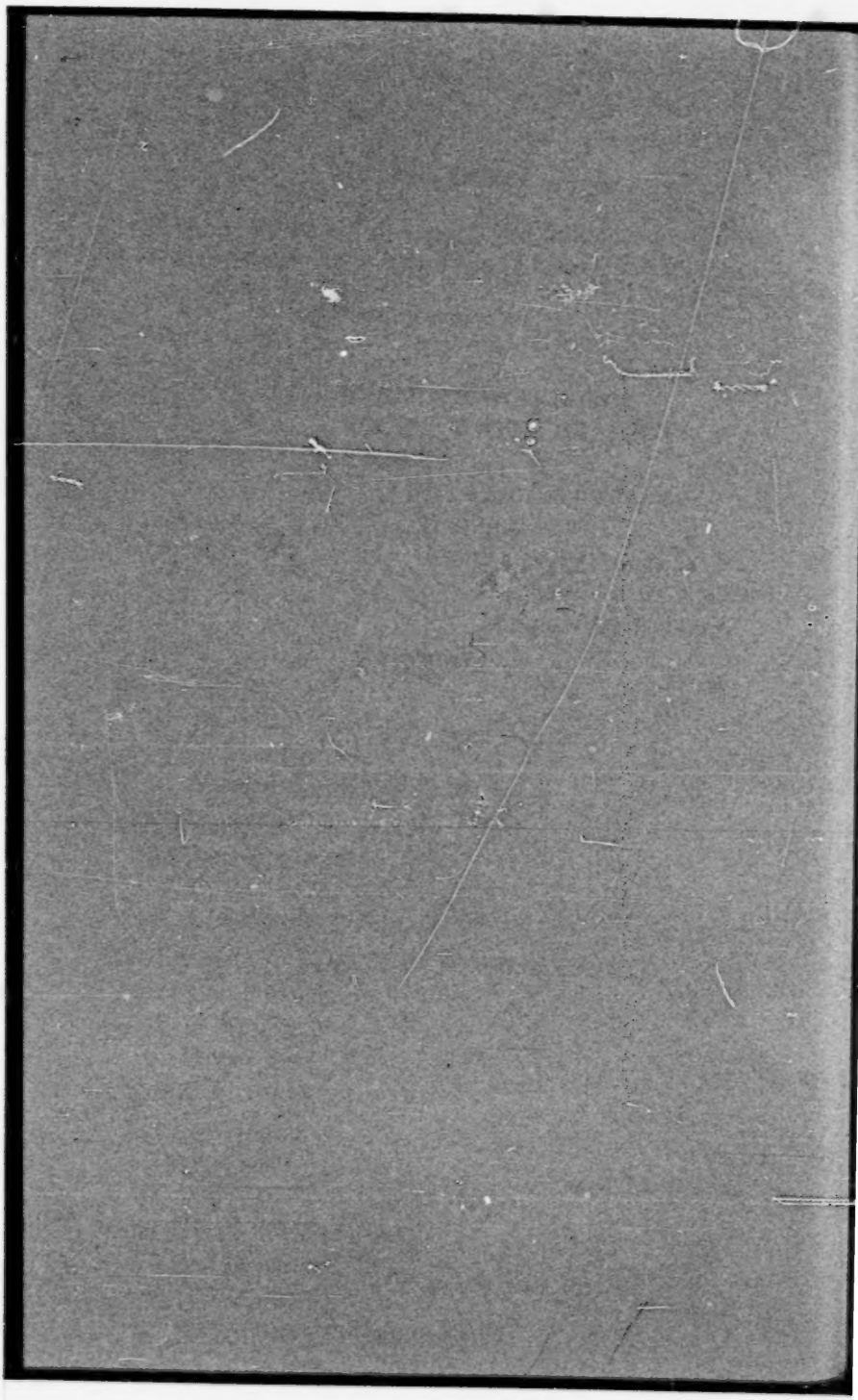
APPENDIX



APPENDIX 1

United States Court of Appeals
For the Eighth Circuit

No. 73-1567

United States of America,
Appellant,

v.

First Western State Bank of Minot, North Dakota; Hayden Thompson; Herbert Meschke; Larry Erickson; Richard Backes; Gary Williamson; and Mark Purdy,
Appellees.

Appeal from the United States District Court for the District of North Dakota

Submitted: December 11, 1973

Filed: January 25, 1974

Before Gibson and Ross, Circuit Judges, and Smith, Senior District Judge*.

Gibson, Circuit Judge.

The United States appeals pursuant to 18 U.S.C. § 3731 from an order of the District Court suppressing any testimonies given by defendants Hayden Thompson, Herbert Meschke, Larry

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* The Honorable Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

Erickson, Richard Backes, Gary Williamson, and Mark Purdy before the Ward County Grand Jury, North Dakota, and "any evidence relating thereto" in this federal charge under 18 U.S.C. § 610. The District Court ordered suppression of defendants' testimonies, any evidence relating to the testimonies, and any use of the testimonies by the Government in relation to defendants' trial in federal court.[1]

This appeals presents only one basic issue: Did the Government establish that the evidence to be introduced in this federal prosecution against defendants had been developed from sources independent from defendants' testimonies before the state grand jury? A related issue arises on the scope of the immunity. Just because the defendants testified to certain facts before a state grand jury does not preclude the United States from presenting evidence of these same facts, if that evidence was secured or derived from sources independent from the immunized state testimony and if the immunized state testimony was not utilized to obtain leads to other incriminating evidence.

The defendants here claim that **Kastigar v. United States,** 406 U.S. 441 (1972), and **Murphy v. Waterfront Commission,** 378 U.S. 52 (1964); impose an almost impossible or insurmountable burden on the Government in prosecuting this case. The Government agrees with that contention, if **Kastigar** is interpreted in the District Court's manner. Since this case has profound implications in the enforcement of the criminal law, we think it advisable to set forth our views of the principles of

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[1] The latest Supreme Court case of **Kastigar v. United States,** 406 U.S. 441 (1972), holds that use immunity satisfies constitutional requirements and that use and derivative use of immunized testimony is proscribed. Thus, no issue is raised on the use of this state testimony itself. It cannot be used. The crucial issue, however, is whether the United States secured its leads and derived its necessary probative evidence by utilizing immunized state testimony to gain other evidence.

Kastigar and **Murphy** as applied to the factual situation presented here.

The United States as a sovereign is not precluded from enforcing its laws by the grant of immunity of another sovereign, in this case the state. However, as a matter of fairness to the defendants and as a constitutional guarantee against self-incrimination, the state immunized testimony cannot be used, directly or indirectly, to prosecute a federal charge. **Murphy v. Waterfront Commission,** 378 U.S. at 79. Because of the far-reaching effects of an order that suppresses vital testimony essential to the prosecution of a criminal charge and thus in effect grants amnesty to these defendants from a federal prosecution, a searching analysis of the purpose and reach of immunity statutes along with an analysis of the factual aspects of this prosecution is in order.

At common law the public had the right to anyone's testimony, but the Constitution protects against self-incrimination. Immunity statutes, long-embodied in our jurisprudential fabric, accommodate both of these values. Immunity is generally offered as a device to secure information on criminal activity committed by those in privy with or those acting in concert with the immunized witness.[2] Often lesser witnesses are induced to testify against more culpable offenders, who often are operating in the higher echelons of criminal activity. It is

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[2] Wigmore says:

> Such statutes, therefore, have for more than two centuries been the expedients resorted to for the investigation of many offenses, chiefly those whose proof and punishment were otherwise impracticable because of the implication in the offense itself of all who could bear useful testimony.

8 Wigmore, Evidence § 2281 at 492 (McNaughton rev. 1961).

For general discussion of the history and purposes of immunity in regards to grants of immunity by the United States, see Comment, **The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope,** 72 Yale L. J. 1568 (1963).

essentially a device to facilitate investigation of charges of corruption. Often immunity is utilized where no other legal means appears to be available or practical to ferret out facts best known to the culpable witnesses. The grant of use immunity does not clothe the witness with any aura of innocence or shield him from prosecution of the crimes inquired about, but only prohibits the use, directly or indirectly, of his testimony against him. This necessarily includes any leads that are derived from such testimony. Thus, where the same sovereign is granting the immunity and also prosecuting, that sovereign does have a heavy burden of showing that all of the essential evidence necessary for conviction was derived from independent sources. Admittedly, in that situation it may be almost impossible to separate immunized testimony and leads resulting therefrom from evidence secured from independent sources. But where the prosecuting sovereign is not the immunizing sovereign, a considerably different situation is presented.

The sovereign not offering immunity has the undeniable right to protect the integrity of its law enforcement perogatives by prosecuting anyone who allegedly has committed an offense against its peace and dignity. When its own evidence and investigation discloses acts of criminal activity, an undeniable right to prosecute exists. This right cannot be controlled, thwarted, or diminished by another sovereign granting immunity from prosecution of a kindred offense. Fair play and constitutional guarantees demand, however, that the prosecuting sovereign not use, directly or indirectly, the immunized testimony or any fruits from it. **Kastigar v. United States,** *supra*; **Murphy v. Waterfront Commission,** *supra*. If the prosecuting sovereign has made its independent investigation and can show nonuse of the immunized testimony, either by lack of access to the immunized testimony or direct statements made in good faith that it did not use the immunized testimony, it should have a clear right to proceed with its own prosecution. However, under **Kastigar** and **Murphy** the prosecuting sovereign

does have the burden of showing an independent source for its evidence.

Under the facts of this case, it would appear that the United States gathered a considerable amount of its evidence starting May 12, 1969, some five months prior to the convening of the state grand jury. During this interval, two federal grand jury sessions were held. Clearly and obviously, any evidence obtained during this period, even in conjunction with any state-federal investigation, antedated the state grant of immunity and should be available for use by the federal government. The Federal Bureau of Investigation reports prior to this date and the minutes of the two prior federal grand jury sessions irrefragably should be considered as independent sources. After the date of the state grant of immunity, closer scrutiny is required to ascertain if the immunized testimony was received or made available to the federal government or was used to obtain other incriminating evidence. Even if some questionable evidence was obtained, that should not preclude the United States from prosecuting if it can do so on the independent and untainted evidence it has secured. Any tainted evidence, of course, would be inadmissible and must be suppressed during the trial. We feel here that the Government should be permitted to make its case, since it claims, in good faith, independent and untainted sources for its evidence and further asserts non-access. The FBI reports and federal grand jury minutes should reveal two independent sources of the Government's evidence. This might be one of the many cases in which only a complete record can ultimately resolve all questions relating to the source of evidence.

With the above principles in mind, we examine the factual background of this appeal. A federal grand jury was convened in North Dakota commencing September 23, 1969, to investigate, *inter alia*, possible contributions by First Western State Bank of Minot, North Dakota (hereinafter Bank), some of its officers, and others, to elections of presidential or vice-presi-

dential electors and members of Congress.[3] Defendants did not testify before the federal grand jury, who returned a true bill on July 31, 1970, charging the Bank with five violations of 18 U.S.C. §610 and the six individual defendants with willfully conspiring to cause the Bank to make contributions to certain federal elections.

Subsequent to the federal grand jury, the Ward County Grand Jury, North Dakota, was called into session October 14, 1969, to investigate the same alleged activity by defendants and others in relation to violations of the North Dakota Corrupt Practices Act, N.D. Cent. Code §16-20-01 *et seq.* (1960). The state grand jury met from October 14, 1969, through December 8, 1969, and all individual defendants testified. Backes testified on October 23rd, Meschke on October 24th and 27th, Erickson on October 29th, Williamson on October 30th and December 3rd, Purdy on December 1st, and Thompson from December 1st through December 3rd. On December 8, 1969, the state grand jury charged each individual defendant with violating N.D. Cent. Code §16-20-08 and §16-20-09 for aiding, abetting, advising, or consenting in making unlawful political contributions. On March 9, 1970, a North Dakota state district court quashed defendants' indictment, since N.D. Cent. Code §16-20-10 granted transactional immunity to defendants on their testimonies before the state grand jury concerning the charged violations. Defendants, however, still faced the above-described federal charges.

In the proceedings below on these federal charges, the defendants moved to quash the indictment because of purported immunity relating to defendants' testimonies before the state grand jury. Although this motion was originally denied on February 3, 1971, by the late Judge Register, defendants again brought the same motion on August 13, 1971. After oral argu-

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[3] The federal grand jury met and was in session during the following times: September 23-26, 1969; October 7-9, 1969; December 1-5, 1969; February 3-4, 1970; and July 28-31, 1970.

ments, the District Court on January 24, 1973, ordered a pretrial evidentiary hearing in order to allow the Government "an opportunity to meet the burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources" from the testimonies given by defendants before the state grand jury. The hearing was held from May 8-10, 1973. The District Court in its order concerning this evidentiary hearing summarized the Government's evidence:

> The hearing was held on schedule. The Government witnesses included Richard B. Thomas, Ward County State's Attorney, and Paul M. Sand, First Assistant Attorney General for the State of North Dakota, officials that conducted the State Grand Jury proceedings; Richard Peterson, Special Agent of the Federal Bureau of Investigation; H. Clifford Miller, Special Agent of the Federal Bureau of Investigation; Harold O. Bullis, United States Attorney, District of North Dakota; Eugene K. Anthony, Assistant United States Attorney, District of North Dakota; John Clark, formerly Trial Attorney, Government Operations Section, Criminal Division, Office of the Attorney General of the United States; and Gary Annear, Assistant United States Attorney, District of North Dakota. By stipulation the deposition of Lynn E. Crooks, Assistant United States Attorney, District of North Dakota, was taken and submitted subsequent to the hearing.
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> In addition to the testimony of the witnesses the Government submitted, for *in camera* inspection, transcripts of testimony given by witnesses appearing before the Federal Grand Jury, together with Federal Bureau of Investigation reports. All of the material thus submitted related to the affairs of the First Western State Bank, Minot, North Dakota.[4]

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[4] The District Court also had the transcripts of defendants' testimonies before the state grand jury, since defendants filed these transcripts on August 13, 1971, with the motion to quash the indictment.

The Government, in part, contended before the District Court, in its brief on appeal, and during oral argument on appeal, that it had no access to the state grand jury transcripts of defendants' testimonies. Defendants have not disputed this assertion, nor have they offered any contradictory evidence. Defendants have argued that the joint state and federal investigation of defendants' activities and the constant communication between the state and federal prosecutors warrant the inference that the federal prosecutors and other officials must have had knowledge of defendants' testimonies before the grand jury that provided at least investigatory leads for evidence on the federal charges. Defendants introduced records of the telephone company showing numerous calls between the state and federal prosecution offices and extensively cross-examined state and federal officials in an attempt to demonstrate that the federal prosecutors had actual knowledge of defendants' testimonies before the grand jury. All Government witnesses denied that federal prosecutors knew any of the testimony or had access to the transcripts. Government witnesses testified that any conversations between the state and federal officials concerned the exchange of documents and the scheduling of witnesses. Ward County State Attorney Richard B. Thomas testified that he did inform federal attorneys that defendants' testimonies before the state grand jury provided nothing productive.

The District Court found that the number of telephone calls Ward County State Attorney Thomas "had with the United State's Attorney's office, the Federal Bureau of Investigation and other investigatory or interested federal agencies leads to the inescapable conclusion that information was conveyed to representatives of the United States Government that proscribe its use in a Federal criminal prosecution in United States Court * * *." The District Court held that the Government failed to meet its burden of proving legitimate, independent sources for its evidence under **Murphy v. Waterfront Commission** and **Kastigar v. United States** and suppressed defendants'

testimonies before the state grand jury, any evidence relating to the testimonies, and any use of the testimonies in relation to defendants' trial on the federal charges.

The scope of the trial court's order is not exactly clear. Obviously, the defendants' state testimonies cannot be used against them. But what is meant by "any evidence relating thereto"? Does this mean independent evidence of the offense testified to cannot be used, thus extending transactional immunity to the offenses testified to, or does it merely impose a ban on evidence obtained as a result of the defendants' immunized testimonies? We assume the latter.

In **United States v. McDaniel,** 482 F.2d 305 (8th Cir. 1973) (hereinafter **McDaniel II**),[5] this court properly interpreted **Kastigar** in holding that the Fifth Amendment only requires use immunity. Defendants, therefore, can only complain if their testimonies before the state grand jury were **used** by the federal government, the prosecuting sovereign, in obtaining evidence against them for their trial under federal charges.

The federal government, however, can use the same evidence testified to by defendants before the grand jury if it can demonstrate that the evidence to be used against defendants came from a legitimate source wholly independent of the compelled testimonies. The prosecuting government's burden of proving a legitimate, wholly independent source for the compelled testimony is explained in **McDaniel II** by quoting **Kastigar:**

> " 'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by es-

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[5] This opinion concerned a review of an earlier remand by this court in **United States v. McDaniel,** 449 F.2d 832 (8th Cir. 1971), **cert. denied** 405 U.S. 992 (1972).

tablishing that they had an independent, legitimate source for the disputed evidence.' [quoting **Murphy v. Waterfront Commission,** 378 U.S. 52, 79, n. 18 (1964)].

This burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

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. . . One . . . need only show that he testified under a grant of immunity in order to shift to the government the **heavy burden** of proving that all of the evidence it proposes to use was derived from legitimate, independent sources."

McDaniel II, *supra* at 310-11, **quoting United States v. Kastigar,** *supra* at 460, 461-62.

Defendants at the evidentiary hearing established that they had testified before the state grand jury concerning activity that is directly concerned with the federal charges in this case. Defendants pursuant to N.D. Cent. Code, § 16-20-10 were eventually granted transactional immunity (as a matter of state law policy) against any possible **state** charges relating to their testimonies. The United States Attorney Bullis stipulated at the commencement of the evidentiary hearing that defendants appeared before the state grand jury. Before the evidentiary hearing, defendants filed with the District Court several documents including the state grand jury transcripts of defendants' testimonies.[6] We think that the state grand jury transcripts clearly

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[6] Filed with this case on appeal are the transcripts of the state grand jury testimonies of defendants, the transcript of the evidentiary hearing conducted by the District Court, and certain exhibits admitted during the evidentiary hearing. The FBI reports and the federal grand jury transcripts admitted during the evidentiary hearing were not filed on appeal.

demonstrate that defendants' testimonies were directly concerned with the federal charges of this case, and the federal government properly was required to demonstrate at the evidentiary hearing the independent sources for its evidence to be introduced against defendants.

We think, however, that the District Court's finding that "not all of the evidence the United States Government proposes to use was derived from legitimate, independent sources and that some of the evidence is a direct result of communications between Federal and State authorities" as a basis for its suppression ruling is clearly erroneous as a matter of law. There is no indication in the District Court's memorandum order that the court attempted to ascertain whether the evidence to be presented came from independent sources or only from the defendants' testimonies before the state grand jury. Although the Government introduced FBI reports concerning investigation of defendants' alleged political contributions, the District Court's order does not indicate that it had reviewed those reports to determine whether they could be a sufficient, wholly independent source from the compelled testimonies. The failure to review the Government's contended independent sources was error and a misinterpretation of the law announced in **Kastigar** and **McDaniel II.**

We further think that the Government has discharged its burden of proving independent sources **during the pretrial evidentiary hearing** by testifying that there was no access by federal authorities to the state grand jury transcripts, by testifying that federal authorities had no knowledge of the compelled testimonies, and by introducing the FBI reports and federal grand jury transcripts as possible independent sources to the District Court for its inspection. This testimony and the introduction of the FBI reports should suffice to carry the Government's burden of proof for the pretrial evidentiary hearing. We therefore reverse the District Court's holding that any evidence relating

to the subject matter of defendants' testimonies before the state grand jury **must be suppressed.**

We support **McDaniel II's** statement that the Government's burden of proving independent sources should "under ordinary circumstances" be shouldered during a pretrial evidentiary hearing. Where substantial evidence is proffered showing a joint investigation, as in this case, a pretrial hearing would be advisable. Not every case, however, would call for a further fragmentation of the trial process by having a full-scale suppression hearing prior to trial. The ascertaining of independent sources can often be better considered during the trial, since all the evidence is placed on the record or offered for introduction at the trial. To some extent, this is a matter of degree. For example, isolated questions concerning suppression of certain evidence should not call for a full-scale suppression hearing of all the evidence that is to be offered by the Government. In general, where feasible and compatible with fairness to the defendant, the trial process should not be further fragmented if at all possible.

The resolution of the Government's burden of proof in **McDaniel II** during a pretrial evidentiary hearing was eased by an admission of the United States Attorney that he had read the state grand jury transcript. **McDaniel II** therefore concluded the testimony read by the United States Attorney "could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case." **McDaniel II,** *supra* at 312. In this light, the **McDaniel II** court held that the Government failed to prove that the United States Attorney "did not use [McDaniel's testimony] in some significant way short of introducing tainted evidence." **McDaniel II,** *supra* at 311. Since the United States Attorney had read the state grand jury transcript in **McDaniel II** and since the reading of a transcript makes proof of independent sources much more difficult for the Government, resolution of this burden of proof issue **duripg a pretrial evidentiary hearing** was considerably facilitated.

In this case, the federal officials have testified that they had no access to or knowledge of the state grand jury transcripts. That testimony, the lack of contradictory evidence by the defendants showing actual knowledge or access to the state grand jury transcripts by federal authorities, and the introduction of the FBI reports and the state and federal grand jury minutes should have discharged the Government's burden of proving independent sources during the **pretrial hearing.**

After reviewing the FBI reports and the state and federal grand jury transcripts, the District Court may indeed find that proffered evidence by the Government during the forthcoming trial has only been derived from defendants' compelled testimonies. If that occurs, suppression of that evidence is demanded.

The District Court's order of suppression is reversed and the case is remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX 2

United States Court of Appeals
for the Eighth Circuit

September Term, 1973

73-1567

United States of America, Appellant, vs. First Western State Bank of Minot, North Dakota, et al., Appellees.	Appeal from the United States District Court for the District of North Dakota

The Court having considered petition for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

March 1, 1974

APPENDIX 3

In the United States District Court for the
District of North Dakota
Northwestern Division

United States of America,
Plaintiff,

vs.

First Western State Bank of Minot, North Dakota; Hayden Thompson; Herbert Meschke; Larry Erickson; Richard Backes; Gary Williamson; and Mark Purdy,
Defendants.

Criminal No. 575.

Order for Evidentiary Hearing as to Claim of Immunity

The Government having conceded that each of the individual defendants herein gave testimony before a North Dakota State Grand Jury under a grant of immunity, and it appearing that the individual defendants may have testified to matters relating to the subject matter of the indictment (one count of conspiracy as to the individual defendants), and it further appearing that the defendants have made a prima facie showing of frequent communications between Federal and State authorities at times when both State and Federal Grand Juries were in session, and immediately prior and subsequent thereto,

It Is Ordered that a pre-trial evidentiary hearing be held at the Federal Courtroom at Minot, North Dakota, commencing May 8, 1973, at 10:00 o'clock a.m., to give the Government an opportunity to meet the burden of proving that all of the

evidence it proposes to use was derived from legitimate independent sources.

Dated at Fargo, North Dakota, this 24th day of January, A.D. 1973.

/s/ Ronald N. Davies
Senior United States District Judge

APPENDIX 4

Memorandum and Order

On the 24th day of January, A.D. 1973, this Court entered the following order in the above-entitled case:

"Order for Evidentiary Hearing as to Claim of Immunity

"The Government having conceded that each of the individual defendants herein gave testimony before a North Dakota State Grand Jury under a grant of immunity, and it appearing that the individual defendants may have testified to matters relating to the subject matter of the indictment (one count of conspiracy as to the individual defendants), and it further appearing that the defendants have made a prima facie showing of frequent communications between Federal and State authorities at times when both State and Federal Grand Juries were in session, and immediately prior and subsequent thereto,

"It Is Ordered that a pre-trial evidentiary hearing be held at the Federal Courtroom at Minot, North Dakota, commencing May 8, 1973, at 10:00 o'clock a.m., to give the Government an opportunity to meet the burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources."

The hearing was held on schedule. The Government witnesses included Richard B. Thomas, Ward County State's Attorney, and Paul M. Sand, First Assistant Attorney General for the State of North Dakota, officials that conducted the State Grand Jury proceedings; Richard Peterson, Special Agent of the Federal Bureau of Investigation; H. Clifford Miller, Special Agent of the Federal Bureau of Investigation; Harold O. Bullis,

United States Attorney, District of North Dakota; Eugene K. Anthony, Assistant United States Attorney, District of North Dakota; John Clark, formerly Trial Attorney, Government Operations Section, Criminal Division, Office of the Attorney General of the United States; and Gary Annear, Assistant United States Attorney, District of North Dakota. By stipulation the deposition of Lynn E. Crooks, Assistant United States Attorney, District of North Dakota, was taken and submitted subsequent to the hearing.

In addition to the testimony of the witnesses the Government submitted, for *in camera* inspection, transcripts of testimony given by witnesses appearing before the Federal Grand Jury, together with Federal Bureau of Investigation reports. All of the material thus submitted related to the affairs of the First Western State Bank, Minot, North Dakota.

The question for determination is simple but vital. Did the Government meet the burden of proving that all of the evidence it proposes to use was derived from legitimate, independent sources?

This Court concludes that the Government wholly failed to meet this burden. The *in camera* material alluded to in the preceding paragraph sheds absolutely no light on whether the Government has met its judicially determined responsibilities.

> "As stated in **Murphy [Murphy v. Waterfront Comm'n,** 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678]:
>
> > 'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that the evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.' 378 U.S., at 79 n. 18.

"This burden of proof, which we reaffirm as appropriate, **is not limited to a negation of taint;** rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source **wholly independent of the compelled testimony."**

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"Moreover, a defendant against whom incriminating evidence has been obtained through a grant of immunity may be in a stronger position at trial than a defendant who asserts a Fifth Amendment coerced-confession claim. One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that **all of the evidence it proposes to use was derived from legitimate independent sources." Kastigar v. United States,** 406 U.S. 441, 460-461, — S.Ct.—, — L.Ed.2d —. (Emphasis added.)

The Court now addresses itself to the testimony of Ward County State's Attorney, Richard B. Thomas, and whether he discussed testimony of the individual defendants given before the Ward County Grand Jury with United States Government officials. The Court finds much of his testimony incredible and unworthy of belief. The number of telephone calls this witness had with the United States Attorney's office, the Federal Bureau of Investigation and other investigatory or interested Federal agencies leads to the inescapable conclusion that information was conveyed to representatives of the United States Government that proscribe its use in a Federal criminal prosecution in United States Court under the decisions of the United States Supreme Court in **Murphy, Kastigar** and their progeny.

It is apparent to this Court that not all of the evidence the United States Government proposes to use was derived from legitimate, independent sources and that some of the evidence is a direct result of communications between Federal and State

authorities, when both State and Federal Grand Juries were in session and immediately prior and subsequent thereto. The herculean task of separating tainted evidence from that which is not could never be determined by this Court at the evidentiary hearing held herein for the basic reason that the United States did not show that all the evidence it proposes to use was derived from legitimate, independent sources. It contended itself with an *in camera* presentation which falls far short of the duty imposed upon it not only by this Court's order of January 24, 1973, but more importantly it fails to meet the tests enumerated by the United States Supreme Court in the cases cited in this memorandum,

For the reasons set out herein,

It Is Ordered that any testimony given by the defendants Hayden Thompson, Herbert Meschke, Larry Erickson, Richard Backes, Gary Williamson and Mark Purdy, all of whom testified under grant of immunity before the Ward County, North Dakota, Grand Jury, or any evidence relating thereto, be and the same is hereby suppressed, and its use prohibited upon trial of Criminal Case Number 575, Northwestern Division, United States District Court for the District of North Dakota.

Dated at Fargo, North Dakota, this 16th day of July, A.D. 1973.

/s/ Ronald N. Davies
Senior United States District Judge

APPENDIX 5

In the United States District Court
For the District of North Dakota
Northwestern Division

United States of America, v. First Western State Bank of Minot, North Dakota, Hayden Thompson, Herbert Meschke, Larry Erickson, Richard Backes, Gary Williamson, and Mark Purdy.	**Indictment** Charge: Violation of Title 18 U.S.C., Sections 610 and 371

The Grand Jury Charges:

Count One

1. First Western State Bank of Minot, North Dakota (hereafter referred to as the Bank) is, and was at all times material to this Indictment, a corporation.

2. On or about August 13, 1966, in the District of North Dakota, Defendant First Western State Bank did knowingly and unlawfully make a contribution and expenditure in connection with an election for the office of United States Representative in Congress, by means of issuing its expense check No. 2244, in the amount of $50.00, drawn on Account No. 0913-1044 at the First Western State Bank, payable to U.S. Postoffice, signed by A. D. Leslie. (In violation of Section 610 of Title 18, United States Code.)

The Grand Jury Further Charges:

Count Two

1. The allegations contained in paragraph 1 of Count One of this Indictment are incorporated in this Count.

2. On or about August 13, 1966, in the District of North Dakota, Defendant First Western State Bank did knowingly and unlawfully make a contribution and expenditure in connection with an election for the office of United States Representative in Congress, by means of issuing its expense check No. 2245, in the amount of $950.00, drawn on Account No. 0913-1044 at the First Western State Bank, payable to U[illegible] States Post Office, signed by A. D. Leslie. (In violation of Section 610 of Title 18, United States Code.)

The Grand Jury Further Charges:

Count Three

1. The allegations contained in paragraph 1 of Count One of this Indictment are incorporated in this Count.

2. On or about September 3, 1968, in the District of North Dakota, Defendant First Western State Bank did knowingly and unlawfully make a contribution and expenditure in connection with the election of Presidential and Vice Presidential Electors in the 1968 general election by causing the issuance of check No. 306, in the amount of $3,500.00, drawn on Account No. 10-926-8 of the Minot License Agency at the First Western State Bank, payable to Douglas Sutter, signed by Jeanne Quick. (In violation of Section 610 of Title 13, United States Code.)

The Grand Jury Further Charges:

Count Four

1. The allegations contained in paragraph 1 of Count One of this Indictment are incorporated in this Count.

2. On or about June 22, 1968, in the District of North Dakota, Defendant First Western State Bank did knowingly and unlawfully make a contribution and expenditure in connection with the election of Presidential and Vice Presidential Electors in the 1968 general election by causing the issuance of check No. 193, in the amount of $420.00, drawn on Account No. 10-926-8 of the Minot License Agency at the First Western State Bank, payable to United Democrats for Humphrey, signed by Jeanne Quick. (In violation of Section 610 of Title 18, United States Code.)

The Grand Jury Further Charges:

Count Five

1. The allegations contained in paragraph 1 of Count One of this Indictment are incorporated in this Count.

2. On or about June 6, 1968, in the District of North Dakota, Defendant First Western State Bank did knowingly and unlawfully make a contribution and expenditure in connection with a primary election held to select candidates for the office of President of the United States, by making a payment of $1,500.00 to Robert Larson. (In violation of Section 610 of Title 18, United States Code.)

The Grand Jury Further Charges:

Count Six

1. The allegations contained in paragraph 1 of Count One of this Indictment are incorporated in this Count.

2. Hayden Thompson was at all times material to this Indictment an officer of the Bank, and from and after February 1, 1966, a Director of the Bank.

3. Herbert Meschke was, from and after February 1, 1966, a Director of the Bank.

4. Larry Erickson was at all times material to this Indictment a Director of the Bank.

5. Richard Backes was, from and after October 12, 1966, a Director of the Bank.

6. Gary Williamson is, and has been since on or about March, 1967, a shareholder of the Bank.

7. Mark Purdy is, and has been since on or about March, 1967, a shareholder of the Bank.

8. At all times hereafter mentioned, the term "Federal election" means an election at which Presidential and Vice Presidential electors or candidates for the offices of United States Senator and United States Representative in Congress, were voted for.

9. From in or about 1964 and continuously thereafter until in or about 1969, in the City of Minot, in the District of North Dakota and elsewhere, Hayden Thompson, Herbert Meschke, Larry Erickson, Richard Backas, Gary Williamson, and Mark Purdy, Defendants herein, and Gary McDaniel, named herein as a co-conspirator but not a Defendant, did wilfully, know-

ingly, and unlawfully conspire and agree with one another and with other persons to the Grand Jurors known and unknown, to violate Section 610 of Title 18, United States Code, in that they did wilfully, knowingly, and unlawfully conspire and agree to cause First Western State Bank to make contributions and expenditures in connection with Federal elections.

10. It was a part of the conspiracy that the Defendants and co-conspirator would cause the Bank to make political contributions and expenditures in pursuance of a plan to increase the Bank's deposits and assets through the acquisition and exercise of political power and influence on the national, State, and local levels.

11. It was further a part of the conspiracy that the Defendants and co-conspirator would cause the Bank to spend money, not only on Federal elections, but also on State and local elections, State and national political conventions, political entertaining, and other political activities, in order to help the Defendants and co-conspirator gain power in the Democratic Non-Partisan League of North Dakota.

12. It was further a part of the conspiracy that the political power to be acquired by the Defendants and co-conspirator would be used in part to exert influence upon agencies and associations participating in Federally-funded or Federally-assisted programs and having substantial funds available for deposit, to place such funds on deposit with the Bank.

13. It was further a part of the conspiracy that the Defendants and co-conspirator would seek election to public or Democratic Non-Partisan Leagues offices themselves and would cause the Bank to bear a large share of the financial burden of their own campaigns for election to such offices.

14. It was further a part of the conspiracy that the use of Bank funds for illegal political contributions and expenditures,

and the nature and extent of the Bank's involvement in political campaigns, would be concealed by channeling bank funds through business enterprises which would appear to be separate and independent from the Bank, but which would, in fact, be used primarily as devices to carry on the Bank's political activities. In that connection, it was part of the conspiracy that the North Dakota Secretarial Service would be used as such a device during the 1966 election year, and that the Minot License Agency would be used for that purpose during the 1968 election year; and it was further a part of the conspiracy that the expenses of the political activities to be carried on through the North Dakota Secretarial Service and the Minot License Agency would be paid by the Bank, by means of loans and transfers of cash from the Bank to those enterprises, and by permitting them to overdraw their checking accounts at the Bank regularly.

15. It was further a part of the conspiracy that the Bank would also be caused to bear the expenses of election campaigns by means of such additional devices as lending the services of salaried Bank employees to campaign organizations while continuing to pay their salaries, donating postage, and permitting regular overdrafts on accounts used for political purposes.

16. In pursuance of the aforesaid conspiracy, and to effect the objects thereof, the Defendants and co-conspirator performed the following and other overt acts within the District of North Dakota and other places:

Overt Acts

1. On or about February 1, 1966, co-conspirator Gary McDaniel became President of First Western State Bank.

2. On or about September 1, 1966, co-conspirator Gary McDaniel arrange to have Glory Ann Dickinson sign a promissory note payable to First Western State Bank, in the amount of $4,000.00.

3. In or about May 1968, co-conspirator Gary McDaniel met with Douglas Sutter and Defendant Larry Erickson at the Ramada Inn, in Minot, North Dakota.

4. In or about April, 1968, co-conspirator Gary McDaniel and Defendants Larry Erickson and Hayden Thompson traveled to South Dakota.

5. In or about October 1967, co-conspirator Gary McDaniel arranged to have the Minot License Agency placed under the supervision of the Bank.

6. From in or about September 1968 until in or about November 1968 co-conspirator Gary McDaniel served as chairman of the Citizens for Humphrey organization in North Dakota.

7. On or about July 16, 1968, co-conspirator Gary McDaniel wrote a letter to Eiler Ravenholt.

8. On or about October 25, 1968, co-conspirator Gary McDaniel wrote a letter to Hubert H. Humphrey.

9. In the general election of 1968 in the State of North Dakota, Defendant Hayden Thompson was a candidate for the office of State Representative, Seventh Legislative District of North Dakota.

10. In the general election of 1968 in the State of North Dakota, Defendant Hayden Thompson served as Finance Chairman for the campaign of Thomas Surgum, a candidate for the office of Attorney General of North Dakota.

11. On or about July 11, 1966, in Minot, North Dakota, Defendant Hayden Thompson met with Defendants Herbert Meschke and Larry Erickson, and co-conspirator Gary McDaniel, and presided over a meeting of the Executive Committee of the Board of Directors of First Western State Bank.

12. In or about 1966, in Minot, North Dakota, Defendant Hayden Thompson gave instructions to Glory Ann Dickinson concerning the preparation and mailing of campaign literature in connection with his candidacy for the office of State Representative, Seventh Legislative District of North Dakota.

13. In the general election of 1966 in the State of North Dakota, Defendant Herbert Meschke was a candidate for the office of State Senator, Fifth Legislative District of North Dakota.

14. In or about June, 1968, at the State Convention of the Democratic Non-Partisan League, in Bismarck, North Dakota, Defendant Herbert Meschke sought the nomination of the Democratic Non-Partisan League for the office of United States Senator in the general election of 1968.

15. In or about 1966, in Minot, North Dakota, Defendant Herbert Meschke gave instructions to Glory Ann Dickinson concerning the preparation and mailing of campaign literature in connection with his candidacy for the office of State Senator, Fifth Legislative District of the State of North Dakota.

16. In the general election of 1966 in the State of North Dakota, Defendant Larry Erickson was a candidate for the office of State Representative, Seventh Legislative District of North Dakota.

17. In or about December 1966, Defendant Larry Erickson became State Chairman of the Democratic Non-Partisan League of North Dakota.

18. In or about 1966, in Minot, North Dakota, Defendant Larry Erickson gave instructions to Glory Ann Dickinson concerning the preparation and mailing of campaign literature in connection with his candidacy for the office of State Representative, Seventh Legislative District of North Dakota.

19. On or about March 10, 1969, in Bismarck, North Dakota, Defendant Larry Erickson met with Defendants Hayden Thompson, Richard Backes, and Herbert Meschke, and co-conspirator Gary McDaniel, at a meeting of the Executive Committee of the Board of Directors of First Western State Bank.

20. In the general election of 1968, Defendant Richard Backes was a candidate for the office of State Representative, Third Legislative District of the State of North Dakota.

21. In or about 1966, in Minot, North Dakota, Defendant Richard Backes gave instructions to Glory Ann Dickinson concerning the preparation and mailing of campaign literature in connection with his candidacy for the office of State Representative, Third Legislative District of the State of North Dakota.

22. On or about April 29, 1969, Defendant Richard Backes met with Defendants Hayden Thompson, Herbert Meschke and Larry Erickson, and co-conspirator Gary McDaniel, at a meeting of the Executive Committee of the Board of Directors of First Western State Bank.

23. In the general election of 1966 in the State of North Dakota, Defendant Gary Williamson was a candidate for the office of State Representative, Fifth Legislative District of North Dakota.

24. In or about June, 1968, in Minot, North Dakota, Defendant Gary Williamson met with Defendant Mark Purdy and co-conspirator Gary McDaniel, and with Robert Larson, Cheryl Bergstrom, Caroline Gardiner, and Douglas Sutter.

25. In or about June, 1968, at the State Convention of the Democratic Non-Partisan League of North Dakota, Defendant Mark Purdy was a candiate for Democratic National Committeeman for the State of North Dakota.

26. In or about January, 1969, at Bismarck, North Dakota, Defendant Mark Purdy met with Defendants Herbert Meschke

and Larry Erickson, and with Robert Larson, and introduced Robert Larson to Fred Harris.

27. On or about August 13, 1966, in Minot, North Dakota, co-conspirator Gary McDaniel directed Alex Leslie to purchase United States postage stamps in the total amount of $1,000.00.

28. On or about September 3, 1968, co-conspirator Gary McDaniel approved payment of the sum of $3,500.00 to Douglas Sutter.

29. On or about June 22, 1968, co-conspirator Gary McDaniel approved payment of the sum of $420.00 to United Democrats for Humphrey.

30. On or about June 6, 1968, co-conspirator Gary McDaniel approved payment of the sum of $1,500.00 to Robert Larson.

31. On or about February 6, 1968, co-conspirator Gary McDaniel paid the sum of $3,000.00 to Defendant Larry Erickson.

32. On or about March 20, 1967, Defendant Herbert Meschke became the Registered Agent of Western Management Corporation.

(In violation of Title 18 United States Code, Section 371.)

A True Bill.

.....
Foreman

Harold O. Bullis
United States Attorney

John E. Clark
Special Attorney

APPENDIX 6

Indictment

Indictment under Section 16-20-08 of the North Dakota Century Code, as amended, making unlawful political contributions by a corporation in the years of 1966 and 1968, in which State-wide elections were held.

I

The Grand Jury of the County of Ward, in the Fifth Judicial District, State of North Dakota, duly and legally impaneled, charged and sworn according to law in open Court at the special October term of the District Court in the year 1969, in and for the said County and State, in the name and by the authority of the State of North Dakota, does hereby charge that at different times in the years of 1966 and 1968, up to May 19, 1969, the First Western State Bank at Minot, North Dakota, a corporation organized and incorporated under the laws of the State of North Dakota, and doing business in this State, did directly or indirectly pay, use, offer, consent, or agree to pay or use, any money, property or anything of value to aid a political party, committee or organization, or to aid a corporation or association organized or maintained for political purposes, or to aid candidates for political office, which political contributions were in violation of the provisions of Section 16-20-08 of the North Dakota Century Code, as amended, and were made, wholly or substantially, by one or more of the following methods, or combinations thereof:

A. The said corporation acquired control of a license agency on or about October 9, 1967, and employed deceptive, circuitous methods in making political contributions by and through such license agency so as to make it appear that such con-

tributions and secretarial services for political purposes came from the earnings of the license agency, whereas, in fact, the political contributions substantially exceeded the earnings of said license agency and consisted of funds of the First Western State Bank which were made available by allowing overdrafts on the License Agency's checking account, making available to said License Agency and allowing it to use proceeds of loans from said bank on notes executed by Jeannie Quick, with the oral understanding and agreement that no demand or collection will be enforced by said bank against Jeannie Quick for such notes, by fictitious loans made by said bank on notes executed in the names of Leonard and Alfred Pietsch, the proceeds of which were used to remove from the bank records loans made by said Jeannie Quick and the overdrafts of the License Agency, by using funds of said bank to pay the salary of Jeannie Quick while she was managing the License Agency and not performing any services for said bank.

B. The said First Western State Bank encouraged the activation of and financed the North Dakota Secretarial Service the successor to the Ward County Research and Development Company, to perform stenographic and clerical services for political candidates or organizations which, as of May 19, 1969, had not paid for such services, but the costs were financed from the proceeds of a loan made by the First Western State Bank on a note executed by Glory Ann Dickinson with the oral understanding that no demand or collection will be enforced against said Glory Ann Dickinson on said note, and from proceeds of a loan on a note executed by the First Western Management Company in favor of Leonard Pietsch, for which a real estate loan with said bank by Leonard Pietsch was reduced in the amount of the Glory Ann Dickinson note, which was later removed from the records of the said bank from the proceeds of fictitious notes of Leonard and Alfred Pietsch, and in this manner the said First Western State Bank made political contributions in violation of law by and through such North Dakota Secretarial Service.

C. The said bank also expended its funds in making available for political purposes goods, materials, and typing equipment without charging or being reimbursed for same;

D. The said bank paid from its funds salaries, fees or wages to certain persons for performing political services; and

E. The said bank in certain instances allowed overdrafts on checking accounts, which accounts were known by said bank to be used solely or primarily for political purposes and activities.

The specific violations are, to wit:

Count 1

That said First Western State Bank, as stated and charged in Paragraph I. above, did in the year of 1968 make political contributions in violation of Section 16-20-08 of the North Dakota Century Code to the campaign activities of Hubert H. Humphrey, the Democrat candiate for United States President, in the manner set forth in Paragraph A. above, by making a payment from the License Agency on June 22, 1968, in the amount of $420.00 to the United Democrats for Humphrey.

Count 2

That said First Western State Bank, as stated and charged in Paragraph I. above, did at different times in the year 1968, from June 1st to November 5th of said year, make political contributions in violation of Section 16-20-08 of the North Dakota Century Code to the campaign activities of Hubert H. Humphrey, Democrat candidate for United States President, by paying for the political services and expenses of the "Humphrey Girls" and other personnel to appear and campaign for said Hubert H. Humphrey at different times and places in the State of North Dakota and in the State of South Dakota.

Count 3

That said First Western State Bank, as stated and charged in Paragraph I. above, did on or about August 13, 1966, make political contributions in violation of Section 16-20-08 of the NDCC to the campaign activities of Rollin Redlin, the Democrat-NPL candidate for United States Congress, in the form of stamps paid for from funds of the First Western State Bank in the amount of approximately $1,000.00.

Count 4

That said First Western State Bank, as stated and charged in Paragraph I. above, did at different times in the year 1968, make political contributions in violation of Section 16-20-08 of the NDCC to the campaign activities of Rollin Redlin, the Democrat-NPL candidate for United States Congress, in the form of secretarial services and paying for some expenses from funds of said bank through the License Agency, as described in Paragraph A. above.

Count 5

That said First Western State Bank, as stated and charged in Paragraph I. above, did at different times in the year of 1968, make political contributions in violation of Section 16-20-08 of the NDCC to the campaign activities of William L. Guy, the Democrat-NPL candidate for Governor of the State of North Dakota, by paying the salary and expenses of Robert Larson as Chairman of "The Dakotans for Guy", from the funds of said bank through the License Agency as described in Paragraph A. and from funds described in Paragraph D. above.

Count 6

That said First Western State Bank, as stated and charged in Paragraph I. above, did during the year of 1968, make political

contributions in violation of Section 16-20-08 of the NDCC to the campaign activities of Robert P. McCarney, the Republican candidate for Governor of the State of North Dakota, by paying a special consideration of $2,500.00 to Glory Ann Dickinson for returning to North Dakota from Colorado to perform secretarial services for Robert P. McCarney at Bismarck, North Dakota, and by paying approximately $1,000.00 as part of her salary while she was performing such secretarial service, which payments were made from the funds of said bank through the License Agency, as described in Paragraph A. above.

Count 7

That said First Western State Bank, as stated and charged in Paragraph I. above, did in the year of 1968, in the month of June, make political contributions in violation of Section 16-20-08 of the NDCC to campaign activities of Mark F. Purdy, a candidate for the office of National Committeeman of the Democrat Party, by providing material, telephone and printing matter and expenses of personnel to campaign at the Democrat Convention in Bismarck, North Dakota, the cost of which was paid for by said bank through the License Agency in the manner as described in Paragraph A. above.

Count 8

That said First Western State Bank, as stated and charged in Paragraph I. above, did on or about July 5, 1968, make political contributions in violation of Section 16-20-08 of the NDCC, to the campaign activities of Thomas L. Burgum, the Democrat-NPL candidate for Attorney General of the State of North Dakota, by paying to said activity the sum of $2,500.00 from the License Agency, which came from funds of the First Western State Bank, as described in Paragraph A. above, and by creating a checking account in the name of "Burgum for

Attorney General", which was overdrawn in its inception in the amount of approximately $3,416.90, and subsequently charged off through a fictitious note.

Count 9

That said First Western State Bank, as stated and charged in Paragraph I. above, did on or about April 7, 1969, make a political contribution in violation of Section 16-20-08 of the NDCC to the Democrat-NPL political organization of the Fifth Legislative District of the State of North Dakota, in the amount of $2,100.00 in a check drawn on the License Agency, which funds were in reality funds of the First Western State Bank, as described in Paragraph A. above.

Count 10

That said First Western State Bank, as stated and charged in Paragraph I. above, did in the years of 1966, 1967, and 1968, make political contributions in violation of Section 16-20-08 of the NDCC to the "Century Club", an inter-party organization created and existing solely for the benefit of the Democrat-NPL political organization, by paying dues for certain members of said "Century Club" from funds of the bank in the amount of $1,300.00 on April 14, 1967.

Count 11

That said First Western State Bank, as stated and charged in Paragraph I. above, did in the year 1968 make political contributions in violation of Section 16-20-08 of the NDCC to "Lloyds of Bismarck", an organization or association functioning primarily for the arranging of and providing for political advertising in newspapers, radio and television for candidates of the Democrat-NPL political party, by allowing and permitting

said organization to overdraw its checking account with the First Western State Bank and by using a fictitious note to remove the overdraft.

Count 12

That said First Western State Bank, as stated and charged in Paragraph I. above, did on or about November 27, 1968, pay to the "Pietsch Flying Service" the sum of approximately $2,086.85 for airplane transportation service used for political activities, in violation of Section 16-20-08 of the NDCC, which funds came from the First Western State Bank through the License Agency, as described in Paragraph A. above.

Count 13

That said First Western State Bank, as stated and charged in Paragraph I. above, did on or about July 13, 1967, make a political contribution in violation of Section 16-20-08 of the NDCC. to the "John F. Kennedy Memorial", which is also to serve as headquarters for the Democrat-NPL Party, in the amount of $4,500.00, which funds came from the First Western State Bank.

Count 14

That said First Western State Bank, as stated and charged in Paragraph I above, did make political contributions in violation of Section 16-20-08 of the NDCC to the Democrat-NPL Party on or about April 14, 1967, in the amount of $1,300.00; on or about June 6, 1968, in the amount of $984.00; and on or about June 10, 1968, in the amount of $658.00, which payments came from funds of the First Western State Bank.

Count 15

That said First Western State Bank, as stated and charged in Paragraph I above, did make political contributions in violation

of Section 16-20-08 of the NDCC to the campaign activities of Douglas Sutter, a candidate for Alderman of the Fifth Ward of the City of Minot, in a special election originally scheduled to be held on April 15, 1969, but which was actually held on June 17, 1969, by permitting the account entitled "Sutter Campaign Fund" to be created by an overdraft on March 19, 1969, and continued to be overdrawn to July 16, 1969, in the amount of $1,656.73, which amount has been charged off as a loss.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of North Dakota.

State of North Dakota

vs.

First Western State Bank
15 Counts

A True Bill, dated December 8, 1969

/s/ Bruno P. Serrano
Foreman of the Grand Jury

Note: Names of witnesses appearing before the Grand Jury are set forth on the page attached and made a part hereof.

I, ..., Clerk of the Ward County District Court, Minot, North Dakota, filed the within instrument on the ... day of December, 1969.

.....
Eldore Leier, Clerk of Court
Fifth Judicial District
Ward County
Minot, North Dakota

Elaine Hendrickson
Hayden Thompson
Joan Parks
Herbert Meschke
Gary Williamson
Herbert L. Thorndal
Jeanette Seitzer
Alfred Pietsch
Robert Larson
Palmer Rustan
Karen Peterson
Louise Vigness
Marjorie Parizek
Linda Donnelly
Margaret Keller
Richard Dobson
Jean Quick
Larry Fiedler
Patricia Wallen
Connie Filler
Thomas Burgum
Wesley Keller
Alex Leslie
Leonard Pietsch
James Norton
Gary McDaniel

Robert Keim
Richard Backes
Sheryl Bergstrom
Lloyd Omdahl
Mark Purdy
Larry D. Erickson
Charles Boyd-Snyd
James McDonald
John Cousins
Carolyn Gardiner
Richard Spaulding
Jonathan Eaton
Mike Dolan
Douglas Sutter
Judith Fitzgerald
Evelyn Pottinger
Patricia Gefroh
Clair Watne
Glory Ann Dickinson
Harold Moen
Karen Morris
Kathy Putz
Marlene Olson

APPENDIX 7

449 F.2d 832 (1971)

United States of America, Appellee,

v.

Gary R. McDaniel, Appellant.

Nos. 20722-20724.

United States Court of Appeals, Eighth Circuit.

Oct. 14, 1971.

Rehearing and Rehearing En Banc
Denied Jan. 3, 1972.

Defendant was convicted before the United States District Court for the District of North Dakota, George S. Register, Chief Judge, of embezzlement and misappropriation of funds and making false entries in records of federally insured bank, and he appealed. The Court of Appeals, Gibson, Circuit Judge, held that if defendant, who had been compelled to testify before state grand jury, with grant of immunity from state prosecution, had testified before jury as to matters related to federal prosecution, the federal indictment should have been dismissed, in view of the fact that the United States attorney had viewed transcript of testimony before state grand jury.

Remanded.

1. Indictment and Information Key 137(1)

A motion to quash the indictment is the proper method of raising issue whether a defendant who has been compelled to testify before state grand jury and who has been granted transactional immunity is entitled to transactional as opposed to use immunity as regards related federal prosecution.

2. Indictment and Information Key 140(1)

Where defendant moved to suppress indictment and filed accompanying motion to take evidence on immunity issues and indicated that once relevant evidence had been discovered he would move to suppress any tainted evidence but who made no motion to suppress evidence to which grant of immunity was claimed to attach issue whether defendant, who had been compelled to testify before state grand jury and who had been granted full immunity from prosecution for matters disclosed, was entitled to "transactional" as opposed to "use" immunity as regards related federal prosecution had been properly raised.

3. Indictment and Information Key 140(2)

Once a defendant demonstrates that he has testified, under state grant of immunity, to matters related to federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.

4. Witnesses Key 297(14), 304(1)

Where the United States district attorney requested and received transcript of compelled state testimony such conduct violated defendant's constitutional privilege against self-incrimination and constituted a prima facie "use" of such testimony

within meaning of rule preventing federal use of testimony compelled by a state grant of immunity. U.S.C.A.Const. Amend. 5.

5. Witnesses Key 297(14), 304(1)

Rule preventing use of state compelled testimony by the federal government also forbids federal access to testimony compelled by state grant of immunity. U.S.C.A.Const. Amend. 5.

6. Criminal Law Key 42

Where the sovereign questioning a defendant under grant of immunity is also the prosecuting sovereign, defendant is entitled to transactional immunity and may not be prosecuted as to those matters to which the testimony relates. U.S.C.A. Const. Amend. 5.

7. Criminal Law Key 42

Although Congress can extend immunity against state prosecution if it so desires by way of supremacy clause, states do not have a corresponding power to impose their immunity grants on the federal government. U.S.C.A.Const. Amend. 5.

8. Criminal Law Key 42

Where there has been a state grant of immunity in return for compelled testimony, the federal government can obtain access to that testimony only at the cost of foregoing federal prosecution as to those matters to which the testimony relates, notwithstanding that the federal government might have an independent source for its evidence. U.S.C.A.Const. Amend. 5.

9. Criminal Law Key 42

Fact that defendant's compelled testimony before state grand jury related only to charges of "bribery" and "corruption", and not to charge of "embezzlement" and "misapplication of bank funds" did not establish that there was no immunity from federal prosecution for embezzlement and misapplication of bank funds since test of whether immunity has been acquired in return for compelled testimony is not what legal labels are attached to the criminal conduct which is the subject of the incriminating testimony but whether the conduct revealed by the compelled state testimony is related to the subject matter of the federal prosecution. U.S.C.A.Const. Amend. 5.

10. Criminal Law Key 1181

Remand for evidentiary hearing on issue whether compelled state testimony relating to violation of North Dakota Corrupt Practices Act was related to subject matter of federal prosecution for misappropriation of funds and making false entries and records of federally insured bank was required where there were not sufficient facts in record to enable reviewing court to make final determination of such issue but there was enough evidence to indicate that defendant's allegation that he had testified to matters relating to federal prosecution was not frivolous. 18 U.S.C.A. §§ 2, 656, 1005; NDCC 16-20-01 et seq., 16-20-10; U.S.C.A.Const. Amend. 5.

11. Judgment Key 828(3.10)

State finding that charges of embezzlement and misappropriation of bank funds were covered by defendant's testimony under grant of immunity under state Corrupt Practices Act was not ultimately binding on the federal government on issue whether any of defendant's compelled testimony related to fed-

eral prosecution for misappropriation of funds and making false entries in records of a federally insured bank. U.S.C.A. Const. Amend. 5.

12. Criminal Law Key 1036(1), 1044

Where all evidence seized in response to subpoena was made available to defendant and his attorneys prior to trial, attorneys made photocopies of anything they desired, no motion to suppress or objection to admission was made on ground that certain evidence fell within attorney-client privilege and no motion to quash subpoena had been made, reviewing court would not determine whether or not such material was protected by attorney-client privilege.

13. Criminal Law Key 641.7(1)

Where counsel of defendant's own choosing was appointed some 5½ months prior to trial and apparently had been working on case for some time prior to that, during that period defendant had been allowed extensive discovery and all costs of discovery and trial were borne by the government, it was not abuse of discretion, in absence of factual showing, to deny motion for an additional attorney some four days prior to date case was set for trial.

14. Criminal Law Key 633(1)

Where no motion for change of venue, on ground of prejudicial pretrial publicity, was made prior to trial, most pretrial publicity had occurred quite some time before trial, any publicity which occurred shortly before trial was due to statements made to press by defendant and his attorney and any member of jury panel who indicated that he had formed an opinion

due to newspaper publicity was excused for cause, there was no error with respect to trial as regards bias and prejudice allegedly due to pretrial publicity.

15. Criminal Law Key 126(1)

Where court could find no error with respect to first trial, as regards bias and prejudice allegedly due to prejudicial pretrial publicity, and there were no intervening circumstances between first and subsequent trials which would justify a change of venue on ground of bias and prejudice, motion for change of venue of subsequent trials was properly denied.

William R. Mills, Bismarck, N. D., for appellant.

Harold O. Bullis, U. S. Atty., Fargo, N. D., for appellee.

Before Gibson and Ross, Circuit Judges, and Eisele,* District Judge.

Gibson, Circuit Judge.

This is a consolidated appeal by the defendant, Gary McDaniel, from conviction in two cases of embezzlement, and misappropriation of funds and making false entries in the records of a federally insured bank, in violation of 18 U.S.C. §§ 2, 656, and 1005. At the time of the events in question, McDaniel was President of the First Western State Bank of the City of Minot, North Dakota, whose deposits are insured by the Federal Deposit Insurance Corporation.

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* United States District Judge for the Eastern District of Arkansas, sitting by designation.

The facts of the case are not seriously in dispute. The bank was significantly involved in various political activities in the state of North Dakota, a circumstance in apparent violation of North Dakota and Federal statutes, and considerable manipulation of bank records was done by various employees of the bank under McDaniel's direction in order to cover up these activities. Most of the transactions involved in these convictions involved this manipulation, although one involving a $27,000 payment on McDaniel's house was apparently not politically connected. Discovery of these irregularities commenced May 12, 1969, when state bank examiners arrived for a routine examination of the bank. The state examiners were shortly joined by examiners of the FDIC, and this prosecution and conviction followed.

Although the defendant raises numerous points of error, the most significant one is that his conviction was obtained in violation of his privilege against self-incrimination under the Fifth Amendment. The facts surrounding this claim of error are as follows:

Shortly after the discovery of irregularities in the bank's operation by state and federal examiners, an intensive investigation was undertaken into the possibility of criminal violations. The complaint in one of the cases before us was filed August 7, 1969. McDaniel was subpoenaed to appear before a federal grand jury on September 23, 1969. He did appear and refused to testify, relying on his privilege against self-incrimination. Upon leaving the grand jury room following this refusal, he was taken to the United States Attorney's office, where he was served with a subpoena to appear before a state grand jury.

McDaniel, on October 15, 1969, appeared before the state grand jury, which was investigating the bank's operations for violations of North Dakota's Corrupt Practices Act, 3 N.D. C.C. § 16-20-01 et seq. North Dakota law prevents any per-

son from refusing to testify on the grounds of self-incrimination before a grand jury investigating violations of the Corrupt Practices Act, but provides full immunity from prosecution for matters disclosed.[1] McDaniel testified for many days before the state grand jury.

On November 6, 1969, the United States Attorney for the District of North Dakota wrote to the Assistant State Attorney General conducting the state's investigation, requesting to see a copy of the state grand jury transcript. The United States Attorney conceded at oral argument before us that he did in fact see the transcript, although he did not concede that McDaniel testified to matters relevant to the instant criminal charges. The state grand jury transcript has not been made a part of this record, and we are not aware of its contents.

On December 8, 1969, the state grand jury returned three indictments against McDaniel, the first one containing fifteen counts of violating the Corrupt Practices Act, the second containing one count of embezzlement of bank funds in excess of $10,000, and the third containing three counts of making false entries in the records of the bank. Federal indictments were returned February 4, 1970, and July 31, 1970.

McDaniel's defense counsel in the state proceedings was the same as his court-appointed counsel in the federal prosecutions.

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[1] The pertinent statute, 3 N.D.C.C. § 16-20-10, provides as follows:

> "No person shall be excused from attending and testifying or producing any books, papers, or other documents before any court upon any investigation, proceeding, or trial for a violation of any of the provisions of section 16-20-08, upon the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate or degrade him. No person shall be prosecuted nor subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be used against him upon any criminal investigation or proceeding."

Motions were made in the state court to suppress the state indictments on the grounds that McDaniel was immune from prosecution under the statute set forth above because of his testimony before the state grand jury. Although the state's attorney opposed the motion to suppress the indictments and the transcript of the grand jury testimony was not produced in the state proceedings, the state's attorney did stipulate in the state hearing on the motion to suppress that McDaniel had testified under subpoena and oath before the state grand jury on all matters encompassed in the state indictments. On the basis of this concession, the state trial judge quashed the state indictments.

Prior to trial on the federal charges, McDaniel's attorney moved to suppress the indictments on the grounds that he had testified under compulsion before the state grand jury and had been granted immunity from prosecution; he also moved for an order to take testimony and produce evidence in support of the motion to suppress. These motions were denied by the trial court on the grounds that the immunity was granted only as to the state crimes designated in the Corrupt Practices Act (e. g., making campaign contributions), that these crimes bore no relationship to the federal crimes with which he was charged, and that therefore the grant of immunity did not extend to these charges. This ruling was made without an evidentiary hearing.

[1, 2] Prior to reaching the merits of this issue, we must deal with the Government's argument that this claim of error has been waived. The Government contends that a motion to suppress the indictment is not the proper method to raise the issue of a prior grant of immunity, and that it should be raised by a motion to suppress evidence to which the grant of immunity is claimed to attach. McDaniel made no motions to suppress evidence on this ground. We reject the Government's contention.

In the first place, this contention begs the basic issue raised in this case, namely whether McDaniel is entitled to "trans-

actional" as opposed to "use" immunity as a result of his appearance before the state grand jury—i.e., whether his compelled testimony before the state grand jury precludes federal prosecution for such crimes as his testimony related to, or whether the federal government is merely prohibited from using that testimony, either directly or indirectly, in its own prosecution. If, as he contends, McDaniel is entitled to transactional immunity, a motion to suppress the indictment is clearly the only means of accomplishing that end. The authorities recognize that a motion to quash the indictment is the proper method of raising this issue. 8 Wigmore, Evidence (McNaughton ed. 1961), § 2282, (4) p. 519; Smith v. United States, 337 U.S. 137, 145, 69 S.Ct. 1000, 93 L. Ed. 1264 (1949); Edwards v. United States, 312 U.S. 473, 61 S.Ct. 669, 85 L. Ed. 957 (1941) (plea in bar, which under the modern federal rules would of course be supplanted by a motion to dismiss).

Furthermore, McDaniel's motion to dismiss was accompanied by a motion to take evidence on the immunity issue in which he clearly indicated that once the relevant evidence had been discovered he would make a motion to suppress any tainted evidence. This motion was also denied without an evidentiary hearing. We conclude that this issue was properly raised in the trial court.

This case presents the difficult question of what immunity is sufficient to supplant the Fifth Amendment's privilege against self-incrimination where the questioning sovereign is a State and the prosecuting sovereign is the Federal Government. It is clear in this case that as to the questioning sovereign, the State of North Dakota, McDaniel received "transactional immunity"—i.e., immunity from prosecution for offenses revealed by the compelled testimony. McDaniel contends that under the standards of Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892), the Federal Government

must also be precluded from prosecuting him for any offenses related to his compelled testimony. He relies primarily on the following language:

> "It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect. * * *
>
> "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the constitution of the United States. * * * In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." *Id.* at 585-586, 12 S.Ct. at 206.

The Government, on the other hand, contends that only "use" immunity—i.e., that neither the compelled testimony nor evidence derived from it may be used in the federal prosecution—is required under the principles of Murphy v. Waterfront Commission, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964), and that there was no such use in the instant case. To this contention, McDaniel responds that **Murphy** and **Counselman** are in irreconcilable conflict and urges us to disregard the rule of **Murphy** and grant the absolute immunity called for by **Counselman.**

We agree with the Government that the **Murphy** rule is controlling in the instant situation and we do not think this presents any necessary conflict with the **Counselman** case. **Counselman** was concerned with the situation where the questioning sovereign is also the prosecuting sovereign. In such a situation, the constitutional problems posed by the Fifth Amendment are not complicated by considerations of federalism.

Where the questioning sovereign is a State, however, and the prosecuting sovereign is the Federal Government, problems of federalism—which also of course are constitutional in nature —affect the Fifth Amendment question. And it is precisely this situation that **Murphy** controls, preventing the use of the compelled testimony by the Federal Government, but not preventing prosecution provided that the Federal Government has an independent source for its evidence.

[3] McDaniel's testimony in the state grand jury proceedings was not actually introduced nor referred to in the federal prosecution. But the Fifth Amendment protection goes further than this and prohibits the Government from using the "fruits" of his testimony. **Murphy,** 378 U.S. at 79, 84 S.Ct. 1594. The Government contends that it has not violated this aspect of the **Murphy** rule, relying on the blanket assertion that all its evidence was obtained from an independent source. The **Murphy** case makes clear, however, that this issue is a question of fact which requires an evidentiary hearing and that the Government has the burden of proof:

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities **have the burden of showing** that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 378 U.S. at 79 n. 18, 84 S.Ct. at 1609 (emphasis added).

[4] Since no evidentiary hearing was held on this issue, under ordinary circumstances we would remand the case for an evidentiary hearing as to whether the defendant in fact testified to matters related to the federal prosecution, as he alleges, and if so whether the Government had an independent source for its evidence. The circumstances of this case, however, are not ordinary, for we are faced with the fact that the United States

District Attorney requested and received a transcript of the compelled state testimony. We conclude that this conduct violated the defendant's Fifth Amendment rights and constitutes a prima facie "use" of the testimony which is prohibited by the **Murphy** exclusionary rule.

We reach this conclusion for the following reasons. The aim of the **Murphy** rule is to leave "the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." 378 U.S. at 79, 84 S.Ct. at 1610.[2] This purpose can be achieved only if the Federal Government is forbidden not only to introduce the testimony as evidence or to obtain investigatory leads from it, but is also forbidden to see it. For if the witness had "claimed his privilege in the absence of a state grant of immunity," there would be nothing for the Federal Government to see. Where the witness has been compelled by a state to testify, he can be put in the same position vis-a-vis the Federal Government only if the Federal Government is forbidden to see his testimony.

Substantial support for this interpretation of the **Murphy** rule of use immunity as applied to another sovereign jurisdiction can be found in Mr. Justice White's concurring opinion in that case, which referred to the Court's holding as a "rule forbidding federal officials **access** to statements made in exchange for a grant of state immunity." 378 U.S. at 93, 84 S.Ct. at 1610. In

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[2] And see Mr. Justice White's concurring opinion, *id.* at 101, 84 S.Ct. at 1615.

> "This approach secures the protections of the privilege against self-incrimination for all defendants without impairing local law-enforcement and investigatory activities. It, of course, forecloses the use of state-compelled testimony **in any manner** by federal prosecutors, but the privilege in my view commands that the Federal Government should not have the benefit of compelled incriminatory testimony. Both the Federal Government and the witness **are in exactly the same position as if the witness had remained silent.**" (emphasis added).

arguing that this rule would adequately protect the witness' Fifth Amendment rights, Mr. Justice White emphasized that the testimony is not ordinarily available to the Federal Government and could be obtained only by misconduct, "a matter quite susceptible of proof."

> "In the absence of any misconduct or collusion by federal officers, whatever increase there is, if any, in the likelihood of federal prosecution following the witness' appearance before a state grand jury or agency results from the inferences drawn from the invocation of the privilege to specific questions on the ground that they are incriminating under federal law and not from the fact the witness has testified in what is frequently an *in camera* proceeding under a grant of immunity. Whether *in camera* or not, the testimony itself is hardly reported in newspapers **and the transcripts and records of the state proceedings are not part of the files of the Federal Government. Access and use require misconduct and collusion, a matter quite susceptible of proof."** Id. at 102, 84 S.Ct. at 1616 (emphasis added).

[5] Another reason for concluding that the **Murphy** rule forbids federal access to testimony compelled by a state grant of immunity is our belief that the Fifth Amendment requires immunity from federal prosecution, or in other words "transactional immunity", where the questioning sovereign is the Federal Government. Of course, if the Federal Government could compel the testimony itself and then prosecute for matters related to the testimony on the basis of "untainted" evidence, or in other words grant only "use immunity", there would be no problem in this case, for by hypothesis the Government would have had the right to see the testimony. And indeed, one Circuit Court of Appeals has held that **Murphy** permits such a result. See Stewart v. United States, 440 F.2d 954 (9th Cir.), cert. granted, 402 U.S. 971, 91 S.Ct. 1668, 29 L.Ed.2d 135 (1971). However, the Seventh Circuit, the Third Circuit and the District

Court for the Southern District of New York have concluded that transactional immunity is required as to the questioning sovereign, and we agree with those decisions. **See** In re Korman, 449 F.2d 32, 9 Crim.L.Rep. 2161 (7th Cir. 1971); Catena v. Elias, 449 F.2d 40, 9 Crim.L.Rep. 2475 (3d Cir. 1971); In re Kinoy Testimony, 326 F.Supp. 407 (S.D.N.Y. 1971). **See also** the dissenting opinions in Piccirillo v. New York, 400 U.S. 548, 91 S.Ct. 520, 27 L.Ed.2d 596 (1971) (the majority did not reach the issue of what type of immunity is constitutionally required).

It is somewhat ironic that the debate concerning the constitutional sufficiency of immunity statutes to replace the Fifth Amendment privilege against self-incrimination has shifted its focus so radically in recent years. In the three cases in which the Supreme Court has upheld immunity statutes in the face of a challenge that they violated Fifth Amendment rights, those statutes provided complete immunity from prosecution. Brown v. Walker, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1896); Ullmann v. United States, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956); Reina v. United States, 364 U.S. 507, 81 S.Ct. 260, 5 L.Ed.2d 249 (1960). Those statutes were sustained in the face of vigorous dissents which contended, not that the statutes gave too much in return for the forced waiver of the Fifth Amendment, but that even complete immunity from prosecution was insufficient to accomplish the protection accorded to witnesses by the Fifth Amendment privilege. As Mr. Justice Brennan has pointed out in his dissent in **Piccirillo,** it has never been suggested by the Supreme Court in cases involving a single jurisdiction that anything less than complete immunity from prosecution is sufficient to replace the privilege against self-incrimination. Piccirillo v. New York, 400 U.S. at 569, 91 S.Ct. 520. (Majority dismissed writ as improvidently granted.)

That the **Murphy** rule of "use immunity" was not intended to be the standard to be applied to a single jurisdiction is demon-

strated by the case of Albertson v. Subversive Activities Control Board, 382 U.S. 70, 86 S.Ct. 194, 15 L. Ed.2d 165 (1965), decided only two terms after the **Murphy** case. In **Albertson,** the Supreme Court struck down a federal immunity statute on the grounds that it did not meet the **Counselman** requirement of immunity from prosecution, and hence violated the Fifth Amendment. The Court reasoned:

> "In Counselman v. Hitchcock, 142 U.S. 547 [12 S.Ct. 195, 35 L.Ed. 1110], decided in 1892, the Court held 'that no [immunity] statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege * * *,' and that such a statute is valid only if it supplies 'a complete protection from all the perils against which the constitutional prohibition was designed to guard * * *' by affording 'absolute immunity against future prosecution for the offense to which the question relates.' *Id.*, at 585-586 [12 S.Ct. at 206.] **Measured by these standards,** the immunity granted by § 4(f) is not complete." 382 U.S. at 80, 86 S.Ct. at 199 (emphasis added).

No suggestion was made in **Albertson** that a "use immunity" standard would meet constitutional requirements, and the **Murphy** case was not even cited. Indeed, the case implicitly rejects such a standard. The Government in that case argued that the information required by the registration form would not be incriminatory because it already had all the information required by the form. The Supreme Court rejected this argument:

> "The representation that the information demanded is of no utility is belied by the fact that the failure to make the disclosure is so severely sanctioned; and permitting the incompleteness of § 4(f) to be cured by such a representation would render illusory the **Counselman** requirement that a statute in order to supplant the privilege, must provide 'complete protection from all the perils against which

the constitutional prohibition was designed to guard.' " *Id.* at 81, 86 S.Ct. at 200.

[6] We think Counselman v. Hitchcock clearly commands "transactional immunity" against the questioning sovereign, and that the constitutional principle requiring "absolute immunity" or protection as wide in scope as the privilege against self-incrimination itself has remained unimpaired throughout the years. The Supreme Court has never deviated from this principle as respects the questioning sovereign, but has consistently and repeatedly cited **Counselman** with approval in applying its holding. **See, e. g.,** Brown v. Walker, *supra* (1895); McCarthy v. Arndstein, 266 U.S. 34, 42, 45 S.Ct. 16, 69 L.Ed. 158 (1924); United States v. Monia, 317 U.S. 424, 428, 63 S.Ct. 409, 87 L.Ed. 376 (1943); Hoffman v. United States, 341 U.S. 479, 490, 71 S.Ct. 814, 95 L.Ed. 1118 (1951); **Ullmann,** *supra* (1956); **Albertson,** *supra* (1965).

The **Murphy** case clarified the existing law and overruled cases restricting the privilege to the questioning sovereign. In expanding the privilege to include a possible but yet real danger of prosecution by a non-questioning sovereign, the **Murphy** Court did establish that as to a non-questioning sovereign "use immunity" was a minimal requirement, and that "use immunity" was a permissible constitutional procedure to use in the dual sovereignty situation. The Court recognized the validity of the privilege as against a non-questioning sovereign, and also the imposition of the Fifth Amendment privilege on the states by way of the Fourteenth Amendment as held in Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

[7] The "use immunity" recognized as constitutionally permissible in **Murphy** appears to be a practical accommodation where dual sovereignties are involved as in our Federal structure, and has the effect of preserving in substantial measure the individual's constitutional privilege against self-incrimination as

to a non-questioning sovereign, while allowing the non-questioning sovereign to administer its own criminal laws and effectuate its own public policy within certain limits.[3]

[8] If the premise is accepted that as to the Federal Government only transactional immunity is sufficient to supplant the privilege against self-incrimination, then it follows that where there has been a state grant of immunity in return for compelled testimony, the Federal Government can obtain access to that testimony only at the cost of foregoing prosecution as to those matters to which the testimony relates. For if the Federal Government must forego prosecution when it compels testimony, under a grant of immunity, then surely it cannot avoid this result by permitting the State to compel the testimony and then obtaining that testimony for its own purposes. By forbidding prosecution under these circumstances, the principles of the transactional rule as to a single jurisdiction are maintained.

From a practical standpoint, also, forbidding prosecution under these circumstances seems to be the only appropriate sanction to apply. If the Government were allowed to prove that it had an independent source for its evidence in spite of the fact that it has had access to and actually seen the compelled testimony, the **Murphy** exclusionary rule of either testimony or its fruits would be significantly weakened. For the Government's burden to prove its independent source arises not upon a showing that it has seen the compelled testimony, but merely upon a showing that the defendant has in fact testified under a state grant of immunity. 378 U.S. at 79 n. 18, 84 S.Ct. 1584. If the

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[3] Congress can, of course, extend the immunity against state prosecution if it so desires by way of the Supremacy Clause of the Constitution. Brown v. Walker, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819 (1895); Adams v. Maryland, 347 U.S. 179, 74 S.Ct. 442, 98 L.Ed. 608 (1954); Ullmann v. United States, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956). States, of course, do not have a corresponding power to impose their immunity grants upon the Federal Government.

Federal Government is allowed to prosecute despite the fact that it has seen the compelled testimony, there is clearly no deterrent to its seeking access to that testimony. Therefore, if, as argued above, **Murphy** is intended to forbid such access, the only effective sanction for this evasion of the **Murphy** rule is to forbid prosecution.

For the foregoing reasons, we conclude that if in fact McDaniel testified before the state grand jury as to matters related to the instant prosecution, then since the Government has seen that testimony, the indictments should be dismissed. To avoid possible misunderstanding, we think it appropriate to emphasize that the failure of the Federal prosecution here arises not because McDaniel was granted immunity under state law, but because the Federal Government took advantage of this immunity to gain access to his testimony. Had there been no such access, the prosecution could have proceeded as normal, subject, on proper objection, to a showing that the Government had an independent source for its evidence.

[9] We next deal with the Government's contention, which was accepted by the trial court as the basis for disposition of this issue, that there is no immunity, either use or transactional, involved in this case because McDaniel's testimony before the state grand jury related only to charges of bribery and corruption, not embezzlement and misapplication of bank funds. The test, however, of whether immunity has been acquired in return for compelled testimony is not what legal labels are attached to the criminal conduct which is the subject of the incriminating testimony, but whether the conduct revealed by the compelled testimony is related to the subject matter of the federal prosecution. The defendant must demonstrate "that he has testified, under a state grant of immunity, to **matters related** to the federal prosecution * * *." Murphy v. Waterfront Comm'n, 378 U.S. at 79 n. 18, 84 S.Ct. at 1609 (emphasis added). This obviously is a question of fact which cannot be determined without an evidentiary hearing.

[10] Since no evidentiary hearing was held on this matter in the trial court, there are not sufficient facts in the record to enable us to make a final determination on this issue. The Government, though admitting that it has seen the transcript of the state grand jury testimony, denies that McDaniel testified as to any matters relating to the federal prosecution. There is enough evidence in the record, however, to indicate that McDaniel's allegation that he has testified as to these matters is not frivolous and that therefore a remand for an evidentiary hearing is warranted.

[11] The essence of McDaniel's defense has been that whatever wrong-doing he participated in with regard to the bank's operations was solely for the purpose of "covering up" the political machinations of the bank and its directors. There is evidence in the record to support this contention. While such facts would of course constitute no defense to the instant charges, they lend credence to his contention that in testifying before the state grand jury as to matters relating to the unlawful political activity at the bank, he testified to matters related to the instant charges. Furthermore, it is to be noted that the state charges against McDaniel, including charges of embezzlement and misappropriation of bank funds, were dismissed on the grounds that they were covered by his testimony under the grant of immunity. While this state finding is not ultimately binding on the Federal Government, it is certainly relevant to McDaniel's prima facie showing that he has in fact testified as to the matters here prosecuted.

In light of the present state of the record as to the immunity issue, the cause is remanded for an evidentiary hearing. If the trial court finds that McDaniel testified before the state grand jury under a grant of immunity to matters related to the instant prosecution or any severable part of them, the charges on which testimony was given must be dismissed; if it finds that he did not so testify, the judgments shall stand, subject of course to the right of either party to appeal as to this issue.

[12] As to the other claims of error raised by the defendant, we affirm the judgment, and will discuss them only briefly.

McDaniel claims that error was committed when his attorneys were forced to turn over evidence to the federal grand jury in response to a subpoena, which evidence fell within the attorney-client privilege, relying on Schwimmer v. United States, 232 F. 2d 855 (8th Cir.), cert. denied, 352 U.S. 833, 77 S.Ct. 48, 1 L.Ed.2d 52 (1956). We need not determine on this record whether or not this material was protected by the attorney-client privilege, for we find that the error, if any, has not been properly raised in the trial court. The record reveals that all the evidence so seized was made available to McDaniel and his attorney prior to trial for their inspection, and that they made photocopies of anything they desired. If any of this evidence was thereafter offered or used at the trial, a motion to suppress or an objection to its admission on these grounds should have been made. A motion to quash the subpoena could also have been made. No such motions were made, and indeed even in this court, McDaniel does not indicate which evidence was improperly admitted because it came within the attorney-client privilege. No reversible error has been shown in this respect.

[13] He also complains that he was denied a fair trial because, being indigent, he was not afforded adequate resources at government expense to prepare his defense. His allegations in this respect are most vague and general. Counsel of defendant's own choosing was appointed by the court on April 1, 1970, and apparently had actually been working on the case for some time prior to that. The case did not come to trial until September 15, 1970. During this period the defendant was allowed extensive discovery of the Government's evidence, and all costs of discovery, and trial, such as witness' fees, subpoenas, etc., were borne by the Government. The only specific claim of error is that the trial court denied his request for an additional court-appointed attorney. The record reveals that the motion for an additional attorney was not made until only four days before

the case was set for trial and that no factual showing was made as to why a second attorney was needed at this late date. Nor has any such showing been made in this court. There was no abuse of discretion in the trial court's failing to grant the motion for a second appointed attorney.

[14] The defendant also complains that he did not receive a fair trial because the jury was biased and prejudiced; in this regard, he contends that the trial court erred in denying his motion for a change of venue to an adjoining state. The first trial was held in Minot and no motion for a change of venue was made as to this trial. The record reveals that most pretrial publicity had occurred quite some time before the trial and that any publicity which occurred shortly before the trial was due to statements made to the press by the defendant and his attorney. Upon this occurrence the trial court entered an order restricting pretrial statements. Any members of the jury panel who indicated that they had formed an opinion on the case due to newspaper publicity were excused for cause. No record was made as to the extent of the pretrial publicity. We find no error with respect to the Minot trial.

[15] Immediately following the guilty verdict at the Minot trial, defense counsel moved to have the remaining trials transferred to Bismarck. This motion was granted and trial set for September 15. On September 9, the defense moved for a change of venue to another state. No intervening circumstances which would justify this change were presented, and as before, no record as to the pretrial publicity was made. The motion was denied. We also find no error in this regard.

All other contentions raised by the defendant have been considered and rejected as being without merit.

The case is remanded for further proceedings consistent with this opinion.

APPENDIX 8

482 F.2d 305 (1973)

United States of America,
Appellant,

v.

Gary R. McDaniel,
Appellee.

Nos. 73-1051 to 73-1053

United States Court of Appeals
Eighth Circuit

Submitted May 18, 1973

Decided July 31, 1973

Defendant was convicted before the United States District Court for the District of North Dakota, George S. Register, Chief Judge, of embezzlement and misappropriation of funds and making false entries in records of federally insured bank, and he appealed. The Court of Appeals, 449 F.2d 832, remanded for evidentiary hearing to determine whether defendant had testified before state grand jury under grant of immunity and, if so, whether testimony related to subject matter of federal prosecution. On remand, 352 F.Supp. 585, the District Court, Paul Benson, Chief Judge, answered both questions in the affirmative and vacated convictions and quashed indictments, and the Government appealed. The Court of Appeals, Matthes, Chief Judge, held that in view of fact that United States attorney was unaware,

at time he read transcript, that defendant's state grand jury testimony came pursuant to grant of immunity, the Government was confronted with insurmountable task in discharging heavy burden of proving that compelled testimony was used, directly or indirectly, in subsequent federal prosecution.

Affirmed.

1. Grand Jury Key 36

Defendant, who had been subpoenaed to appear before North Dakota grand jury investigating possible violations of state's Corrupt Practices Act, was not required to first invoke constitutional privilege against self-crimination and then be informed that Act conferred transactional immunity, to avoid having been found to have appeared voluntarily and, thus, to have waived automatic statutory protection; defendant, who did not volunteer nonresponsive confessions in attempt to acquire immunity for crimes not under inquiry, did not lose privilege as to any portion of his testimony. NDCC 16-20-01 et seq., 16-20-10.

2. Criminal Law Key 42

Issue dispositive of whether subsequent criminal prosecution of person who has been compelled to testify under grant of immunity violates constitutional privilege against self-incrimination is not whether compelled testimony relates to subsequent charges but whether the prosecution has used the compelled testimony in prosecuting subsequent charges. U.S.C.A. Const. Amend 5.

3. Criminal Law Key 223

Ordinarily once a defendant demonstrates that he has testified under a prior grant of immunity as to matters related to subsequent prosecution, a pre-trial evidentiary hearing is necessary for the Government to discharge its heavy burden of proof that

all of the evidence it proposed to use in subsequent prosecution was derived from legitimate independent sources. U.S.C.A. Const. Amend. 5.

4. Criminal Law Key 1134(2)

Even though FBI reports received by United States attorney prior to commencement of state grand jury proceedings were excluded from evidence by trial judge in determining whether evidence produced at subsequent federal prosecution was derived from source independent of witness' compelled state grand jury testimony, Court of Appeals was free to consider Government's offer of proof of reports as it was part of record on appeal. U.S.C.A.Const. Amend. 5; Fed.Rules Civ.Proc. rule 43 (c), 28 U.S.C.A

5 Witnesses Key 304(3)

To be coextensive with constitutional privilege against self-incrimination, the immunity granted a witness on compelling him to testify must forbid all prosecutorial use of such testimony, direct as well as indirect, and not merely that which results in presentation of evidence before a jury; immunized use includes assistance in focusing investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination and otherwise generally planning trial strategy. U.S.C.A.Const. Amend. 5.

6. Criminal Law Key 42

Where United States attorney was unaware that compelled state grand jury testimony came pursuant to grant of immunity, federal attorney could not have perceived any reason to segregate witnesses' testimony from his other sources of information; under such circumstances Government was confronted with

insurmountable task in discharging heavy burden of showing that all evidence used in subsequent federal prosecution was derived from legitimate sources wholly independent of compelled testimony; in view of inescapable conclusion that compelled testimony could not be wholly obliterated from prosecutor's mind in preparation and trial of case a finding of proscribed use of compelled testimony was mandated and indictments were required to be dismissed and federal conviction vacated. NDCC 16-20-01 et seq.; U.S.C.A.Const. Amend. 5.

Harold O. Bullis, U. S. Atty., Fargo, N. D., for appellant.

William R. Mills, Bismark, N. D., for appellee.

Before Matthes, Chief Judge, and Lay and Stephenson, Circuit Judges.

Matthes, Chief Judge.

We have for consideration the government's appeals from judgments entered after an evidentiary hearing held on remand as directed by this court on defendant's appeals from his convictions. See United States v. McDaniel, 449 F.2d 832 (8th Cir. 1971), cert. denied, 405 U.S. 992, 92 S.Ct. 1264, 31 L.Ed. 2d 460 (1972). The judgments from which appeals are now taken vacated the earlier judgments of conviction, dismissed the indictments, ordered McDaniel discharged, and his bond exonerated. The factual circumstances warrant detailed explication.

Defendant Gary McDaniel* was, prior to these proceedings, President of the First Western State Bank in Minot, North Dakota. That bank and McDaniel apparently were for some time engaged in irregular and illegal activities involving the bank

* Hereinafter McDonald is referred to as "defendant" or by his surname.

assets. These irregularities were first discovered on or about May 12, 1969, by state bank examiners who were soon followed by examiners for the Federal Deposit Insurance Corporation. Consequently, state prosecutorial authorities began investigating the political machinations of the bank and its officers as possible violations of North Dakota's Corrupt Practices Act, 3 N.D. C.C. § 16-20-01 et seq.; and the United States Attorney for the District of North Dakota began investigating the personal maneuverings of the bank officers for the purpose of determining whether federal criminal statutes had been violated.

On September 23, 1969, defendant, who was then residing in the state of Minnesota, was subpoenaed to appear before a federal grand jury at Fargo, North Dakota, on October 7, 1969. He appeared, but claimed his privilege against self-incrimination, and gave no testimony. McDaniel went from the grand jury room to the United States Attorney's office, where the local sheriff immediately served him a subpoena to appear before a state grand jury at Minot, North Dakota, on October 15, 1969.

Prior to his appearance before the state grand jury, defendant sought, in exchange for his testimony, immunity from prosecution under 6 N.D.C.C. § 31-01-09 (Supp.1971), which was denied. Defendant's attorney then discovered 3 N.D.C.C. § 16-20-10, which provides in pertinent part:

> "No person shall be excused from attending and testifying . . . before any court upon any investigation . . . for a violation of . . . section 16-20-08, upon the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate . . . him. No person shall be prosecuted nor subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence . . . .

McDaniel's attorney realized that this statute automatically conferred transactional immunity upon any witness subpoenaed to testify in an investigation under the North Dakota Corrupt Practices Act, and accordingly he advised McDaniel to appear before the state grand jury and fully divulge all his illegal actions.

That the state prosecutors were unaware of this automatic immunity statute is evidenced by the fact that they subpoenaed all potential defendants, thereby immunizing every suspect except the bank itself, and by the fact that they expressly granted immunity to one grand jury witness under the more recent statute, § 31-01-09.

In any event, McDaniel appeared at the state grand jury and gave self-incriminating testimony filling three volumes of transcript. On November 6, 1969, the United States Attorney requested a copy of McDaniel's testimony from an Assistant State Attorney General, which he received the late afternoon of November 20. Since the United States Attorney too apparently was unaware that McDaniel's testimony was protected by a statutory grant of immunity, he read the three volumes of transcript and then returned them the next morning.

Thereafter, on December 8, 1969, McDaniel was indicted by the state on fifteen counts of violating the Corrupt Practices Act, one count of embezzlement, and three counts of making false entries.

Federal indictments were returned on February 4 and July 31, 1970. The four counts of the initial federal indictment dealt with the purchase of the Ranger Bar, a cocktail lounge. Three of these counts charged that McDaniel had violated 18 U.S.C. § 656 in that he had embezzled and misapplied $56,637.20 to finance the transaction by issuing cashier's checks from the bank in that amount without repaying the bank. The

fourth count charged a violation of 18 U.S.C. § 1005, alleging that, to cover the issuance of the cashier's checks, McDaniel had made a false entry in the bank records showing as an asset a nonexistent deposit with another bank.

The seven counts of the second federal indictment dealt with miscellaneous schemes. In four counts, McDaniel was charged with embezzling and misapplying $44,716.90 by issuing two checks without repaying the bank, converting a third check to his personal use, and issuing a fourth on a fundless account, all in violation of § 656, supra. The final three counts alleged that McDaniel had further violated § 1005 by making three separate false entries of fictitious deposits by the bank to show assets to cover the sums embezzled.

McDaniel sought to have all state and Federal indictments quashed on the ground that the Fifth Amendment precluded his prosecution for transactions touched upon by his immunized state grand jury testimony. The state court, Judge Coyne, accepted the argument that § 16-20-10 conferred transactional immunity and quashed the state indictment; but the federal court, Judge Register, declined to quash the federal indictments. Consequently, McDaniel was tried in federal court in two trials, convicted on all eleven counts, and sentenced to five years imprisonment on one conviction and concurrent terms of three and two years on the others.

McDaniel then appealed to this court, and at oral argument on that appeal the United States Attorney conceded that he had read McDaniel's state grand jury testimony on the evening of November 20, 1969. This court held that the United States Attorney's reading of McDaniel's state grand jury testimony "constitutes a prima facie 'use' " of it, and therefore, if that testimony was given under a grant of immunity, and if it related to the subject matter of the federal prosecutions, McDaniel could not be prosecuted for those transactions. United States

v. McDaniel, *supra*. Accordingly, the cause was remanded to the district court for an evidentiary hearing to determine whether McDaniel had testified under a grant of immunity, 449 F.2d at 840, and, if so, whether the testimony related to the subject matter of the federal prosecution. 449 F.2d at 841.

After conducting the mandated evidentiary hearing, Judge Benson answered both propounded questions affirmatively and therefore, in accordance with his conception of our opinion, vacated the convictions and quashed the indictments. 352 F. Supp. 585.

However, Judge Benson's task at the evidentiary hearing was complicated by the intervening decision of the Supreme Court in Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

This court's prior opinion in **McDaniel I,** authored by Judge Gibson, had interpreted the pre-**Kastigar** decisions of the Supreme Court to establish a double standard with respect to the constitutionality of statutes which grant immunity to witnesses in order to compel testimony. First, this court determined that Counselman v. Hitchcock, 142 U.S. 547, 12 S.Ct. 185, 35 L. Ed. 1110 (1892), applied full transactional immunity when the federal government was both the questioning sovereign and the prosecuting sovereign, thereby preventing federal prosecution for any crime relating to the subject matter of the compelled testimony. If, on the other hand, the questioning sovereign were the state, Murphy v. Waterfront Commission, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964), governed, and the federal government was permitted to prosecute the witness for crimes related to his testimony, so long as there was no use of the compelled testimony or its fruits. Thus we ruled that, in inter-jurisdictional cases, the Fifth Amendment required no more than use and derivative use immunity, even while single jurisdictions were bound by full transactional immunity.

By means of this analysis, it was determined that under ordinary circumstances McDaniel would only be entitled to use immunity, since his grand jury testimony had been compelled by the state, and the federal government was acting as prosecutor. However, because the United States Attorney had read the three-volume transcript of McDaniel's testimony, our court felt forced to conclude that the federal government was in the same position as if it were the questioning sovereign, and that therefore transactional immunity applied. The only question then remaining was whether McDaniel had in fact testified before the state grand jury under a grant of immunity to matters related to the prosecution, and, as seen, that caused the remand.

In **Kastigar,** of course, the Supreme Court held that use and derivative use immunity is constitutionally sufficient to compel testimony over a claim of Fifth Amendment privilege even in cases in which the federal government is both questioner and prosecutor. Accordingly, at the evidentiary hearing in this case, the government sought to open a third issue by seeking to prove under the **Kastigar** guidelines that it had independent sources for the evidence it used to convict McDaniel. For this purpose, it offered into evidence F.B.I. reports based upon an investigation of McDaniel that had been received by the United States Attorney's office prior to McDaniel's testimony. But McDaniel's counsel objected to this evidence on the ground that this court's mandate did not allow the trial court to explore that issue. The district court sustained this objection, and excluded the reports from evidence, admitting them only as an offer of proof. Nevertheless, in his memorandum dismissing the indictments, the district judge observed that could he apply **Kastigar** his result would differ:

> "On the basis of the government's offer of proof in the McDaniel evidentiary hearing, this Court finds that the government had, prior to the grand jury testimony, all the

evidence used in the McDaniel prosecution, and further finds that evidence was derived from legitimate sources wholly independent of the compelled testimony. This evidence consists of comprehensive investigative Federal Bureau of Investigation reports. See Government's Offer of Proof, Exhibits 36-41 inclusive."

It is with this extensive and complicated factual background that we consider the government's three contentions on appeal: (1) that McDaniel's testimony was not given under a grant of immunity; (2) that the testimony did not relate to the subject matter of the federal prosecution; and, alternatively, (3) that the United States did not "use" that testimony to convict McDaniel.

[1] First the government contests Judge Benson's conclusion of law that when McDaniel testified before the state grand jury pursuant to a subpoena, he was automatically granted immunity by § 16-20-10. The government's position tacitly concedes that, ordinarily, the statute automatically confers immunity on any witness subpoenaed to testify upon an investigation of violations of § 16-20-08, but contends that since McDaniel seized this opportunity to gain absolution of his wrongs, he waived the immunity. The essence of this argument is the contention that unless McDaniel first invoked the Fifth Amendment and then was told that § 16-20-10 granted him immunity, he was acting voluntarily and thus waived the statutory protection. But the Supreme Court has held precisely to the contrary in a case involving a federal statute worded similarly to § 16-20-10. **See** United States v. Monia, 317 U.S. 424, 430, 63 S.Ct. 409, 87 L.Ed. 376 (1943). **Accord,** State v. Hennessey, 195 Or. 355, 245 P. 2d 875, 881 (1952) (en banc). Furthermore, it is not contended that McDaniel lost the privilege as to any portion of his testimony by volunteering nonresponsive confessions in an attempt to acquire immunity for crimes not under inquiry. **Cf.** United States v. Wilmington Chemical Corp., 254 F.Supp. 92

(N.D. Ill. 1966). Accordingly, we find no error in Judge Benson's conclusion that McDaniel's testimony was covered by a grant of immunity.

[2] The government's second contention faults Judge Benson's finding of fact that McDaniel's testimony "related to" the federal prosecution. However, this inquiry, which was mandated by this court's earlier remand, is, in light of **Kastigar,** no longer germane. Because we held transactional immunity to be required by the Fifth Amendment, it was necessary under our earlier opinion to inquire whether the indictment had to be quashed on grounds that the testimony "related to" the transaction giving rise to the prosecution. But under **Kastigar,** that no longer is a basis for quashing the indictment. The question under **Kastigar** is not whether the testimony relates to the charges,[1] but whether the prosecution has "used" the testimony in prosecuting those charges. It is to that dispositive question that we turn.

In writing for the Court in **Kastigar,** Mr. Justice Powell equated the protection provided by the statute in question with the protection provided by the Fifth Amendment and held that the

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[1] Even if the question were whether the testimony related to the federal charges, we think that the following finding by Judge Benson would not be clearly erroneous.

> "After reading the entire grand jury transcript, it is this court's finding that the testimony discernably be separated from material incriminating to McDaniel. All counts are in some way connected to the shortage of $214,900 [which McDaniel explained to the grand jury].
>
> Taken as a whole, the 472 pages of grand jury testimony implicate McDaniel in every aspect of the various schemes. The insignificance appears only when a line or page is viewed as a complete unit."

We note that in support of this conclusion the trial court meticulously set out in its memorandum opinion each count of the two federal indictments, coupled with a summary of that portion of McDaniel's incriminating grand jury testimony which related to that count.

"statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom . . . This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures."

406 U.S. at 460, 92 S.Ct. at 1664. In order to enforce this prohibition of use of immunized testimony, the Court reaffirmed the rule of **Murphy**:

> " 'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.'
>
> This burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.
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> * * * * * * *
>
> . . . One . . . need only show that he testified under a grant of immunity in order to shift to the government the **heavy burden** of proving that all of the evidence it proposes to use was derived from legitimate, independent sources."

406 U.S. at 460, 92 S.Ct. at 1665 (citations omitted) (emphasis supplied).

[3] Clearly, this test envisions, under ordinary circumstances, a pre-trial evidentiary hearing at which the government must discharge its "heavy burden" of proof; but both parties here

contend such a hearing is unnecessary. The government says Judge Benson has already explored that contention and made a finding of fact that the government has carried its burden. Defendant contends that in the peculiar circumstances of this case it is impossible for the government to furnish the degree of proof **Kastigar** requires.

Judge Benson's finding that the evidence produced on the government's behalf at McDaniel's trial was derived from a source independent of McDaniel's state grand jury testimony was premised upon the court's careful examination of the government's offer of proof by the F.B.I. reports received by the United States Attorney prior to the commencement of the state grand jury proceedings.

[4] We are free to consider the offer of proof as it is a part of the record before us, even though excluded from evidence by the trial judge. United States v. Agy, 374 F.2d 94, 95 (6th Cir. 1967); F. H. McGraw & Co. v. Milcor Steel Co., 149 F.2d 301 (2d Cir. 1945). **See** Rule 43(c), Fed.R.Civ.P.; 5 Moore's Federal Practice § 43.11, p. 1383 (2d ed. 1971).

[5] We find, however, that even though the voluminous reports, which we have examined, may have afforded proof of an independent source of the evidence adduced at McDaniel's trial, such reports nevertheless fail to satisfy the government's burden of proving that the United States Attorney, who admittedly read McDaniel's grand jury testimony prior to the indictments, did not use it in some significant way short of introducing tainted evidence. **See** The Supreme Court, 1971 Term, 86 Harv.L. Rev. 181, 186 (1972); Note, Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli, 82 Yale L.J. 171, 185, 186 (1972). Such use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.

Kastigar, after all, proscribed "any use, direct or indirect. . . ." And, indeed, if the immunity protection is to be coextensive with the Fifth Amendment privilege, as it must to be constitutionally sufficient, then it must forbid all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury.

The three volumes of transcript in which McDaniel fully confessed his misdeeds were read in their entirety by the United States Attorney three and eight months, respectively, before the two federal indictments were handed down. Furthermore, they were read when the United States Attorney was unaware that the testimony came pursuant to a grant of immunity, and he therefore could have perceived no reason to segregate McDaniel's testimony from his other sources of information. Under these circumstances, we are of the opinion that the government is confronted with an insurmountable task in discharging the heavy burden of proof imposed by **Kastigar.** In this regard, we note with interest that in United States v. Dornau, 359 F.Supp. 684 (S.D.N.Y. 1973), District Judge Metzner recently arrived at a similar conclusion on strikingly similar facts, stating:

> "[O]nce the subject matter was touched upon in the privileged testimony, and the prosecutor had read it, he could have used it in a variety of ways in this criminal prosecution. The possibility of such use, and the impossibility of clearly showing that the use did not occur calls for the holding in this case that the defendants were denied the constitutional protection that their silence would have given them."

[6] Because the trial court apparently failed to consider the immeasurable subjective effect of the prosecutor's reading of McDaniel's state grand jury testimony, we conclude that the court's finding that the government had fulfilled the burden of proof required by **Kastigar** cannot stand.

In so concluding, we cast no reflection upon the integrity or motives of the United States Attorney. To the contrary, he has demonstrated by his appearances in our court and the records of the trials in the district court that he is a prosecutor who adheres to the high professional standards of the legal profession and to the duties and responsibilities of a United States Attorney. But even so, the United States Attorney is subject to human frailties. Thus, although he asserts that he did not use McDaniel's testimony in any form, we cannot escape the conclusion that the testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case. We agree with Judge Metzner that "[i]t is difficult for the court to speculate as to the effect that the reading of the minutes might have had on the conduct and thinking processes of the [prosecutor]." United States v. Dornau, *supra*.

We also deem it appropriate to observe that this appeal and the troublesome question presented derive from unusual circumstances. By reason of the principles promulgated in **Kastigar,** the problem at hand is not likely to reoccur with any degree of frequency. Ordinarily, the question whether the prosecutor has made any use, direct or indirect, of the compelled testimony can and should be fully explored by an appropriate hearing before trial. Here, as we have seen, the question was not ventilated until after the trial. In sum, the unusual circumstances attending the controversy renders the government's burden of proof in this case virtually undischargeable. Another remand for yet another evidentiary hearing would be a futile gesture. Accordingly, the judgments vacating the convictions and dismissing the indictments are affirmed.